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DOCUMENTS FROM THE LEAGUE OF NATIONS COMMITTEE
OF EXPERTS FOR THE PROGRESSIVE CODIFICATION
OF INTERNATIONAL LAW

PROJECTS PREPARED BY THE INTERNATIONAL COMMISSION
OF JURISTS AT RIO DE JANEIRO, 1927

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ADOPTED AT LAUSANNE, 1927

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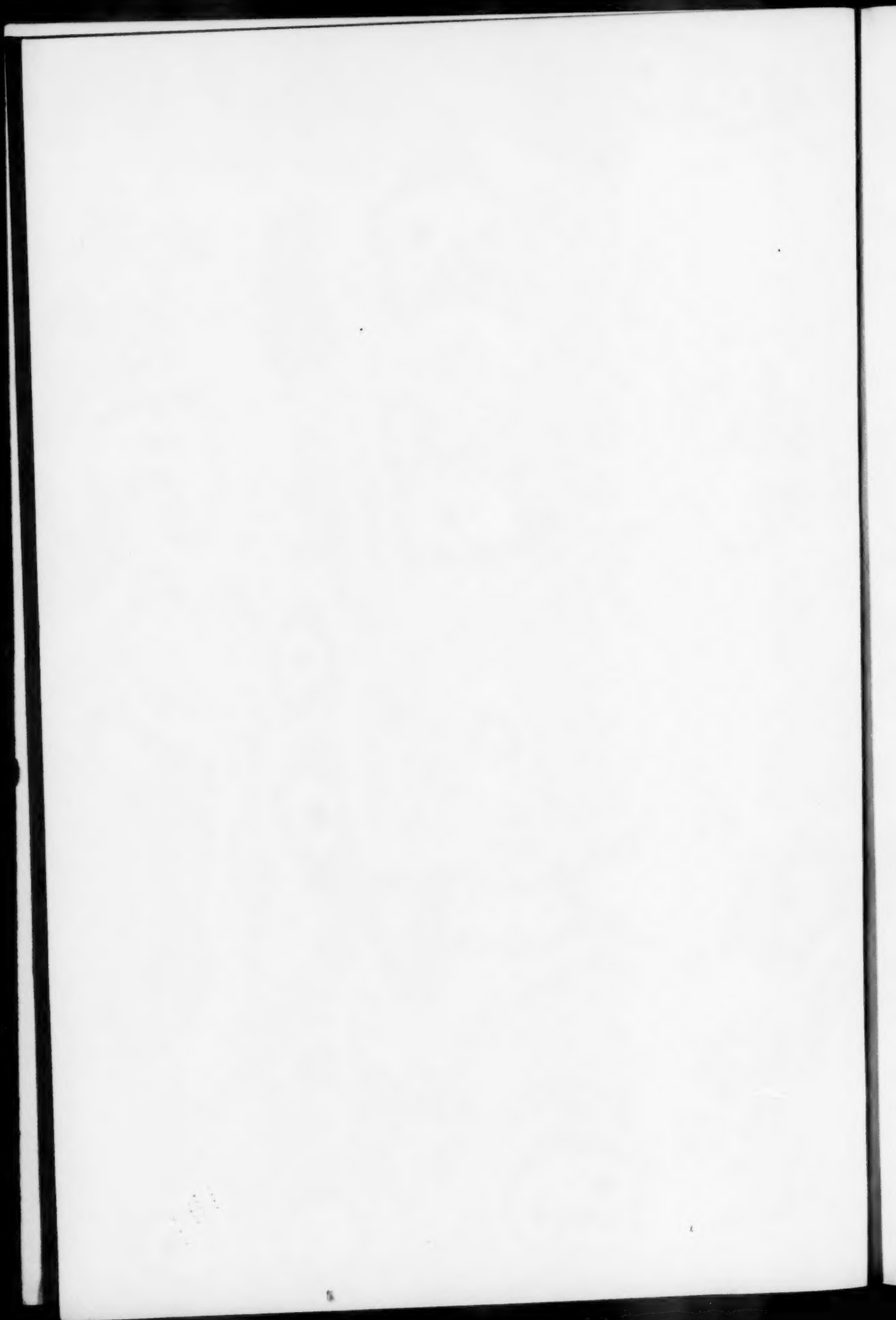


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**RESOLUTION ADOPTED BY THE ASSEMBLY OF THE LEAGUE
OF NATIONS AT ITS MEETING HELD ON MONDAY,
SEPTEMBER 22ND, 1924**

The Assembly,

Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to international conciliation, communications and transit, the simplification of Customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor;

Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

Requests the Council:

To convene a committee of experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilisation and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

- (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

**COMPOSITION OF THE COMMITTEE OF EXPERTS APPOINTED
BY THE COUNCIL OF THE LEAGUE OF NATIONS**

Chairman:

M. HAMMARSKJÖLD (Sweden), Governor of the Province of Upsala.

Vice-Chairman:

Professor DIENA (Italy), Professor of International Law at the University of Pavia; Member of the Conseil du Contentieux diplomatique at the Italian Ministry of Foreign Affairs.

Members:

- Professor BRIERLY¹ (Great Britain), Professor of International Law at the University of Oxford.
- M. FROMAGEOT (France), Legal Adviser to the Ministry of Foreign Affairs of the French Republic.
- His Excellency Dr. Gustavo GUERRERO (Salvador), Minister for Foreign Affairs of the Republic of Salvador; Representative of Salvador on the Council of the League of Nations.
- Dr. B. C. J. LODER (Netherlands), former Member of the Supreme Court of the Netherlands; Judge and late President of the Permanent Court of International Justice.
- Dr. BARBOSA DE MAGALHAES (Portugal), Professor of Law at the University of Lisbon; Barrister, former Minister of Foreign Affairs, Justice and Education.
- His Excellency Dr. Adalbert MASTNY² (Czechoslovakia), Czechoslovak Minister in Rome; President of the Czechoslovak Group of the International Law Association.
- His Excellency M. MATSUDA (Japan), Doctor of Law; Japanese Ambassador in Rome.
- Sir Muhammad RAFIQUE (India), former Judge at the High Court of the United Provinces.
- Dr. Szymon RUNDSTEIN (Poland), Barrister at the Court of Appeal at Warsaw; Legal Adviser to the Ministry of Foreign Affairs.
- Professor Walther SCHÜCKING (Germany), Professor at the University of Kiel.
- Dr. José León SUAREZ² (Argentina), Dean of the Faculty of Political Science at the University of Buenos Ayres.
- Professor Charles DE VISSCHER² (Belgium), Professor in the Faculty of Law at the University of Ghent; Legal Adviser to the Belgian Ministry of Foreign Affairs.
- Dr. WANG CHUNG-HUI² (China), Deputy Judge of the Permanent Court of International Justice.
- Mr. George W. WICKERSHAM (United States of America), formerly Attorney-General of the United States; Member of the International Law Committee of the American Bar Association; and President of the American Law Institute.

¹ Replaced at the third session of the Committee by Dr. Arnold D. MCNAIR, University Lecturer at Cambridge; Reader in International Law in the University of London.

² MM. Mastny, Suarez, De Visscher and Wang Chung-Hui were unable to be present at the third session.

THIRD SESSION OF THE COMMITTEE OF EXPERTS FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW *

Letter Dated April 2nd, 1927, from the Chairman of the Committee to the
Secretary-General, Reporting on the Work of the Third Session of the
Committee, Held in March-April 1927, and Communicating to the
Secretary-General Various Questionnaires and a Report for
Transmission to Governments †

[Translation.]

The Committee of Experts for the Progressive Codification of International Law, appointed by the Council of the League of Nations in execution of the Assembly's resolution of September 22nd, 1924, was required, under its terms of reference:

1. To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
2. After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to study the replies received; and
3. To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In the course of its third session, held at Geneva from March 22nd to April 2nd, 1927, the Committee decided to submit to the Council four reports¹ on certain questions which appeared to be "sufficiently ripe" and "on the procedure which might be followed with a view to preparing eventually for conferences for their solution," and it further requested me to communicate to you the attached questionnaires,² which it prepared at this session.

These questionnaires are entitled:

- No. 8. Communication of Judicial and Extra-judicial Acts in Penal Matters.
- No. 9. Legal Position and Functions of Consuls.
- No. 10. Revision of the Classification of Diplomatic Agents.
- No. 11. Competence of the Courts in regard to Foreign States.

* For documents originating in the first and second sessions of the Committee of Experts, see Special Supplement to this JOURNAL, July, 1926.

† Publications of the League of Nations. V. Legal. 1927. V. 5.

¹ See documents printed, *infra*, pp. 4-45.

² See documents printed, *infra*, pp. 46-132.

This is the second communication of the kind made under the Committee's terms of reference.

In accordance with these terms of reference, the Committee will be obliged if you will be so good as to request the various Governments to send to you, for transmission to the Committee, their opinion upon the question whether the regulation by international agreement of the subjects treated, both in their general aspects and as regards the specific points mentioned in the questionnaires, is desirable and realisable in the near future.

When it has received the replies from the Governments, the Committee will examine them, with a view to reporting to the Council in accordance with its terms of reference.

For the purpose of continuing its work, the Committee would be glad if the replies could be received by the Secretariat of the League of Nations before December 31st, 1927. Should a Government consider some of the subjects treated in the questionnaires to be more suitable for immediate consideration than others, the Committee would be happy to receive its replies upon such subjects without delay and in advance of the replies upon the other matters.

In addition to the subjects mentioned in the above questionnaires, the Committee studied another question, namely, the effect of the most-favoured-nation clause. After consideration, the Committee came to the conclusion that this subject should not be included in the provisional list to be submitted to Governments. It desires, however, to communicate to them for their information the report of the Sub-Committee appointed to examine this subject.¹

The Committee has submitted special reports to the Council on the questions of the nationality of commercial corporations and of the recognition of the legal personality of foreign commercial corporations.²

Three questions have been carried over to the programme of the Committee's next session:

1. The question of the application of the notion of prescription in international law;
2. The question of the legal position of private non-profit-making international associations and of private international foundations;
3. The question of conflicts of laws on domicile.

Owing to various unforeseen circumstances, the question of conflict of laws concerning contracts for the sale of goods, which was referred for examination to a Sub-Committee at the preceding session, has been deleted from the programme of the Committee.

In a letter dated January 30th, 1926,³ I had the honour to inform you

¹ See document printed, *infra*, p. 133.

² See documents printed, *infra*, pp. 157 and 171.

³ See document printed in Special Supplement to this JOURNAL, July, 1926, p. 18.

that "other provisional lists"—besides the questionnaires annexed to that letter—"may subsequently be submitted by the Committee to Governments." Today the situation is somewhat different. It is true that by no means all the matters capable of solution by international conventions have been exhausted; indeed, they probably never will be exhausted. It is also true that, if the League of Nations ceased to interest itself in the codification of international law, the only effect would be that initiative and leadership in this matter would pass to some other quarter. Nevertheless, the Committee has felt that it should abstain from submitting fresh questions to Sub-Committees for examination. In the first place, it is only natural that the Committee—to avoid all risk of useless labour—should desire to wait and observe what action will be taken on its first proposals. Secondly, it must be recognised that the available resources will be fully occupied for some time in carrying out the work which the Committee already has in view. Lastly, it would seem—to judge from the initiative which is being taken in other quarters—that enthusiasm for codification is finding fresh channels which may prove more fruitful. It is rather for the regular organs of the League than for the Committee to decide what attitude should be adopted in this situation. At its next session, the Committee will be quite prepared to resume, if it appears desirable, the selection of new subjects to be referred to Sub-Committees for examination, and, also generally, to continue in its full extent the work which has been entrusted to it.

I have the honour to request you, in the name of the Committee, to transmit these observations to the proper quarters.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS ON THE QUESTIONS WHICH APPEAR RIPE FOR INTERNATIONAL REGULATION*

(QUESTIONNAIRES NOS. 1 TO 7)

Adopted by the Committee at its Third Session, held in March-April, 1927

The Committee, by its terms of reference, was required:

- (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In accordance with these terms of reference, the Committee has addressed to all Governments, through the Secretary-General, a first series of questionnaires on the following subjects:

Nationality; Territorial Waters; Diplomatic Privileges and Immunities; Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners; Procedure for International Conferences and Procedure for the Conclusion and Drafting of Treaties; Piracy; Exploitation of the Products of the Sea.

All these questionnaires, copies of which are attached to the present report (Annex I),¹ indicated, by drafts of conventions or in some other manner, the extent to which in the opinion of the Committee the above questions lent themselves to regulation by international agreement. The Committee was at special pains to confine its enquiry to problems which it thought could be solved by means of conventions without encountering any obstacles of a political nature.

The Committee is now in possession of a large number of replies sent by Governments to the questionnaires. The Committee has studied these replies in conformity with its terms of reference.

* Publications of the League of Nations. V. Legal. 1927. V. 1.

¹ Printed in Special Supplement to this JOURNAL, July, 1926.

This examination has only confirmed the Committee's view that, generally speaking, the above questions, within the limits indicated by the respective questionnaires, are now, in the words of the terms of reference, "sufficiently ripe."

The procedure which could be followed with respect to preparing eventually for conferences for the solution of the questions will be the subject of a general report and of two special reports.¹

The Committee ventures to attach to the present report the replies received by it (Annex II)² together with analyses of these replies prepared by members of the Committee (Annex III).³ Further, the Committee places at the disposal of the Council its minutes, which contain material which may prove useful both in preparing for conferences and during the conferences themselves.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

Annex I

QUESTIONNAIRES ADOPTED BY THE COMMITTEE AT ITS SECOND SESSION, HELD IN JANUARY, 1926

[Printed in Special Supplement to the AMERICAN JOURNAL OF INTERNATIONAL LAW
for July, 1926.]

Annex II

REPLIES BY GOVERNMENTS TO THE QUESTIONNAIRES

[Omitted from this Special Supplement because of their length.]

Annex III

ANALYSES OF REPLIES RECEIVED FROM GOVERNMENTS TO QUESTIONNAIRES SUBMITTED BY MEMBERS OF THE COMMITTEE

QUESTIONNAIRE No. 1.—NATIONALITY

ANALYSIS OF REPLIES SUBMITTED BY M. RUNDSTEIN

The majority of the replies agree that the question of nationality is one suitable for immediate consideration. Naturally, the object in view is codification by stages, by the elimination of problems which might encounter political obstacles and by giving preference to the regulation of matters which are mainly of secondary importance. Generally speaking, there is approval of the view set out in the Committee's report postulating the method of *limited selection* as that best adapted in *statu quo hodie*.

¹ See documents printed, *infra*, pp. 39, 43, and 44.

² Omitted from this Special Supplement.

³ Printed, p. 5.

I

Nine countries are in favour of an immediate codification of questions relating to nationality, though they do not mention details. The first seven of the following countries have *in principle* accepted the views contained in the preliminary draft:

- (1) Australia;
- (2) Brazil;
- (3) Bulgaria;
- (4) Czechoslovakia;
- (5) France (subject to reservations in regard to certain articles);
- (6) Poland;
- (7) Salvador;
- (8) Kingdom of the Serbs, Croats and Slovenes.
- (9) United States (which suggests that the details should be considered in any negotiations which ensue).

II

Eleven countries,¹ while recognizing that the subject is suitable for codification and that international regulation may ultimately be undertaken, consider that certain clauses in the preliminary draft are at variance with the provisions of their municipal law.

Accordingly, these States, though not opposed to codification, would have good grounds for reservations in regard to particular provisions. The difficulty is in reality only apparent, since the preliminary draft may be modified and cannot be regarded as a "ne varietur" document. It is, therefore, reasonable to suppose that the States enumerated below should be included among the supporters of codification, especially as some of them are anxious to extend its scope by including problems not dealt with in the preliminary draft.

- (1) Austria;
- (2) Cuba;
- (3) Estonia;
- (4) Finland;
- (5) Greece;
- (6) Japan (subject to further study, on which the competent authorities are at present engaged);
- (7) Norway;
- (8) Roumania;
- (9) Spain;
- (10) Sweden;
- (11) Switzerland.

¹ Also Egypt, whose reply was received after the Committee's session.

III

Venezuela and *Italy* are the only countries which have given definitely negative replies.

The *British Empire* and *India* do not consider that it would be possible to regulate questions of nationality as a whole by international agreement, or desirable at the present time to attempt to do so.¹ On the other hand, these States consider that the special questions of dual nationality and statelessness might be regulated forthwith.

IV

Finally, it should be noted that three countries take up a special point of view, namely:

(1) *Belgium*, which considers that an agreement on questions of nationality is impracticable and that the only possible solution is the conclusion of bilateral conventions;

(2) *The Netherlands*, which considers that codification by stages, though not easy, nevertheless appears to be possible, and takes the view that an examination of the question should be postponed to allow of its being dealt with at the Sixth and Seventh Hague Conferences; and

(3) *Italy*, which, emphasising the difficulties arising out of conflicts of the *jus sanguinis* and the *jus soli*, favours rather the settlement through private treaties.

V

It should be added that the following countries have promised to submit replies, which, however, have not yet been received:

- (1) Denmark;
- (2) Egypt;
- (3) Germany (which points out that the consideration of this question has not yet been completed);
- (4) Portugal.

As you are aware, the Committee thought that Article 6 of the preliminary draft could not be included among the matters capable of forming the subject at present of international regulation. I must, however, state that the Committee's pessimistic view was not justified, for a number of States think that the provisions of Article 6 are acceptable and even desirable, (e.g., Roumania, Belgium, Switzerland, Austria—Sweden as regards paragraph 2 of Article 6 only).

¹ Also New Zealand, whose reply was received after the Committee's session.

QUESTIONNAIRE NO. 2.—TERRITORIAL WATERS

ANALYSIS OF REPLIES SUBMITTED BY M. SCHÜCKING

I. States which admit the Possibility and Desirability of a Convention on this Question

The following twenty-one States have replied affirmatively in principle:¹

Germany.—"The German Government has examined the questionnaires of the Committee of Experts for the Progressive Codification of International Law transmitted with your letter of March 22nd, 1926, with a view to determining whether the regulation of the subjects treated therein is desirable and realisable in the near future. The German Government considers that the following subjects could be so dealt with:

"1. Territorial Waters.

.....

"In the first place, as regards the question of *Territorial Waters*, the German Government starts from the principle that the extent of the territorial sea should continue to be three nautical miles as at present. This is also the view expressed by the Council of the Deutsche Gesellschaft für Völkerrecht in the resolution given in the Annex to the German reply. The German Government further accepts the remainder of this resolution, which corresponds in all essential respects with the principles embodied in the draft convention of the Committee of Experts. The German Government accordingly considers that the draft in question provides a suitable basis for a first attempt to regulate by international agreement the question of territorial waters. Subject to a final statement of its views, the German Government desires to draw attention to the remarks on certain points of detail in the draft which are given in the attached observations."

Australia.—"I have the honour, by direction of the Prime Minister, to inform you that the Commonwealth Government considers it desirable to endeavour to secure the regulation by international agreement of all the subjects dealt with in the questionnaires which accompanied your letter, viz.:

- "1.
- "2. Territorial Waters.
- "3.

"To what extent agreement is realisable can only be ascertained by a conference for the purpose of formulating rules which are generally acceptable, but it would appear to the Commonwealth Government that agreement on many points, if not on all, ought to be attainable.

¹ Also Egypt and New Zealand, whose replies were received after the Committee's session.

"The Commonwealth Government is of opinion that the subjects which might be selected for immediate consideration are:

- "1.
- "2. Territorial Waters.
- "4.

Brazil.—"M. Schücking's draft, as revised by the Committee, realises a recommendation we made in 1911:

"It would be highly desirable to fix the zone of the jurisdictional sea by international agreement in such a way that States might, without conflict of sovereignty, supervise and police this area for the maintenance of order, the punishment of crime, the regulation of fishing, the prevention of contraband and the establishment of such general rules as may be deemed necessary for navigation and commerce, without prejudice to the rights of international trade."

"The questions selected as a commencement of the work of codification are, in our opinion, capable of settlement, and their settlement would be desirable."

British Empire.—"I am directed by Secretary Sir Austen Chamberlain to inform you that His Majesty's Government consider the amended draft convention on territorial waters a useful basis for future discussion."

Bulgaria.—"In reply to your letter C. L. 25. 1926. V, I have the honour to inform you that, in the opinion of the Bulgarian Government, the regulation by international agreement of the subjects treated in the questionnaires is desirable and realisable."

Cuba.—"There would be no difficulty either, in principle, in preparing a convention on territorial waters."

Denmark.—"The Danish Government is of opinion that a settlement of this question by international agreement is desirable and realisable in the near future. It regards the memorandum submitted by the Committee, with the draft convention attached, as an excellent piece of work which might very suitably form the basis of subsequent negotiations for an international convention on the subject."

Estonia.—"The draft convention drawn up by the special Sub-Committee and amended by M. Schücking appears to me to be deserving of Estonia's adhesion."

United States of America.—"It is the view of the Government of the United States that international arrangements on the general subjects of: . . . (2) Territorial Waters . . . would serve a useful purpose and would therefore be desirable, and that there would be no insuperable obstacles to the concluding of agreements on these general subjects. The Government of the United States is not prepared at this time to state

whether all the points mentioned in the questionnaires on the subjects referred to would yield to regulation by international agreement, nor does it desire to express an opinion regarding the desirability or possibility of regulating all the points by international agreement until it has had opportunity to make a more intensive study of them than it has as yet done. The details would seem to be proper matters for discussion in any negotiations which may ensue."

Finland.—"The Finnish Government is convinced that the questions relating to territorial waters should be considered as one of the most suitable branches for general regulation. At the same time, the practical need for unification in this branch is making itself felt more and more urgently in view of the multiplicity of the interests it affects in the lives of modern nations."

Greece.—"In reply to your letter of March 22nd last, I have the honour to transmit to you herewith the observations of the Technical Commission set up to examine the points raised in the questionnaire which accompanied your letter.

"The opinion of the Commission does not, in the main, differ from the conclusions reached by the Committee of Experts.

"The Hellenic Government is of opinion that the settlement of these problems by means of international agreement would, in principle, be desirable.

"It reserves the right, however, to define, enlarge or modify, if necessary, at the proper time and in the proper place, the opinions advanced by the above Commission.

"The Technical Commission agrees with the Committee of Experts that it is necessary to solve by means of an international convention the problems connected with the rights of the riparian State within its territorial waters."

India.—"I am directed by the Secretary of State for India to inform you that the Government of India consider that the amended draft convention on Territorial Waters is a useful basis for future discussion."

Irish Free State.—"I have the honour to inform you that the Government of the Irish Free State, having examined the Questionnaire and Draft Convention on Territorial Waters included therein, consider that it offers an acceptable basis for discussion of the subject by an international conference.

Japan.—"The Imperial Government considers that the reports on Questions . . . 2, . . . referring to . . . , territorial waters, . . . respectively, might provide a satisfactory basis for discussion. It would observe, however, that these reports contain certain points which it could not approve in their present form, and would add that the competent Japanese authorities are, at present engaged in a very careful study of these problems."

Portugal.—"Portugal has already explained her point of view in Admiral Vicente de Almeida de Eça's report, which was approved on July 28th, 1925,

by the Portuguese Permanent Commission of International Maritime Law, and in the observations recently made by the representatives of that Commission during the Conference of the International Law Association at Vienna. These views were also expressed in a detailed statement made by Dr. Barbosa de Magalhaes before the League of Nations Committee of Experts for the Progressive Codification of International Law. Portugal, while valuing the report of the Committee of Experts most highly, and being of opinion that it would be difficult to carry into effect any draft convention which did not conform to the usages and requirements of the different countries, . . ."

(Opinion of the Permanent Commission on International Maritime Law, Lisbon.)

Roumania.—"The provisions of this draft Convention, which has been drawn up with such competence and skill by the distinguished Rapporteur, could be adopted by the Royal Government subject to the observations set out above."

Salvador.—"In the opinion of the Government of Salvador, the regulation by international agreement of these subjects, both in their general aspects and as regards the specific points studied in the relevant reports of the Sub-Committees, is desirable in the near future."

Kingdom of the Serbs, Croats and Slovenes.—"The Royal Government considers that the questions proposed by the Committee should be codified."

Sweden.—"The Swedish Government considers that the conclusion of an international convention on questions connected with territorial waters would be highly desirable. The vagueness of international law on certain points is obviously a source of much inconvenience. The proposed convention, moreover, need not necessarily constitute a schematic and uniform settlement of all these questions. On the contrary, we should endeavour to produce an international agreement so drafted as to take into proper account the acquired rights of and dissimilar conditions existing in the various countries. In any case, the Swedish Government considers that the opportunity afforded the various Governments of expressing their views on the subject—so that the necessary conditions of an international settlement may be more clearly determined—is an excellent preparatory step."

Czechoslovakia.—"Czechoslovakia's interest in the codification of this branch of the law is practically confined to the general interest felt in the clarification and regulation of international relations as soon as possible and as far as practicable."

Venezuela.—"This Ministry has given due consideration to these questions, and has reached the conclusion that, in regard to the following subjects, there exists a body of principles that have definitely secured international acceptance:—Territorial Waters, . . . These questions would therefore seem to be sufficiently ripe to be considered by international conferences."

II. *States which do not think that the Conclusion of a Convention is either Possible or Opportune*

These are the following three States:

France.—"On the other hand, the French Government thinks that an agreement on Question 2, . . . : Territorial Waters, . . . would be premature or else would be hardly practicable.

"The regulation of the question of territorial waters is conditioned in the different States by such diverse requirements, due to the geographical, economic and political factors involved, that it would be difficult to regulate in a uniform manner. It has often been proposed to draw up general regulations with regard to territorial waters, and it has never yet been found possible to give practical effect to this proposal. It seems likely that in future difficulties will be encountered similar to those which have prevented success in the past."

Italy.—"We are of opinion that, in this question also, it will be difficult to secure general international agreement on account of the widely different geographical, economic and political circumstances in the various countries, their divergent needs in the matter of defence and the fact that the requirements of countries which have an ocean seaboard are dissimilar from those of countries whose shores are washed by inland seas. The insuperable difficulties which similar efforts have encountered in the past are bound to re-occur in the near future and frustrate all attempts to formulate uniform rules for this branch of the law."

Poland.—"With reference to the question of territorial waters, the Government holds that this problem cannot, as a whole, yet form the subject of codification, opinion being still so divided as to the extent of the 'territorial sea' and the rights of riparian States over waters situated outside that zone. On the other hand, problems relating to jurisdiction in the matter of commercial ships in maritime ports do not, from the point of view of codification, raise any serious difficulty, and they might thus be solved on a uniform basis."

III. *States whose Replies are neither definitely Affirmative nor Negative*

These are the following two States:

Norway.—"The Norwegian Government considers it highly important and desirable that international law, the relative vagueness of which in this matter has caused many difficulties in international relations, should be clarified and defined as far as possible. It feels, however, that the reasons which can be adduced in favour of such action vary so considerably from country to country that it is difficult for a State to reply separately and definitely to the main questions until sufficient data have been obtained regarding the practice followed in other countries and the light in which they regard their own territorial waters. In the opinion of the Norwegian Government, the

questionnaire is a first preliminary step towards international agreement on these questions."

Netherlands.—"Territorial waters also constitute a problem which it would be difficult apparently, in the present state of law, to settle at once and *in toto*. Her Majesty's Government feels, however, that in this case also an international conference would be useful even if it did nothing more than define the questions on which agreement seemed possible. It would, however, be highly desirable, before the conference met, to set up a preparatory committee which would clear the ground and define the precise scope of the conference's work."

IV. *States which refrain from proposing any Solution or which have abstained from replying*

These are the following three States:

Austria.—"As Austria is not a maritime Power, the Federal Government refrains from giving any opinion on the questions dealt with in Questionnaire 2 (Territorial Waters). . . ."

Spain.—"Among the fundamental principles laid down in this questionnaire is one fixing the area of the territorial . . . sea at three marine miles. This is contrary to Spanish law. . . ."

Switzerland.—"We shall duly communicate to you as soon as possible the observations which the Federal authorities may have to offer regarding Questionnaires 3, 4 and 5. As regards the *other* questionnaires, we have noted their contents with interest, but, as the problems with which they deal are of only very indirect concern to our country, the Swiss Government, at least for the present, does not feel itself called upon to express any views concerning them."

QUESTIONNAIRE NO. 3.—DIPLOMATIC PRIVILEGES AND IMMUNITIES

ANALYSIS OF REPLIES SUBMITTED TO THE COMMITTEE VERBALLY BY M. DIENA
(*Extract from the Minutes of the Seventh Meeting of the Third Session, March 26th, 1927*)

Professor DIENA was glad to note that the replies to the questionnaire No. 3 were very favourable and almost unanimous. Accordingly, the conclusion could at once be drawn that the question was capable of forming the subject of an international conference. There was only one exception, namely, the British Government, which had replied in somewhat discouraging terms. The Indian Government had replied in identical terms.

It was not for the Rapporteur to criticise those replies. This would be a great error. He could not, however, help hoping that the British Government's reply was not final.

The Australian Government had replied in a sense favourable to the solution of the question by an international conference. Now, Australia was

entitled to take part in an international conference on her own account, and to assume obligations by adhering to a convention, even though the British Government did not. For the moment, however, Australia had no diplomatic representatives. This situation might be modified in the future. Her interests had been hitherto safeguarded by the British diplomatic agents, but, if the Australian Government were to take part in an international conference at which the British Government was not represented, and supposing that a convention was concluded on the subject of diplomatic immunities and privileges, the diplomatic agents in Great Britain who represented coincidentally Great Britain and Australia would accordingly be in possession of different prerogatives according to whether they represented the one or the other of these countries. Diplomatic prerogatives related at once to the public and private life of the agent. It was difficult to imagine such a situation as this. It should, on the other hand, be pointed out that, in the matter of diplomatic privileges, Great Britain often conferred more than she obtained, and that it could not accordingly be in her interest that such a situation should be permanent.

Hence the reply from the Australian Government, like that from the United States Government, might be considered as favourable in principle.

*Favourable Replies:*¹

The great majority of the replies were favourable to the convening of an international conference on the matter in hand. Certain Governments had even discussed the question with great care and in detail. Among these might be mentioned Germany, Estonia and Switzerland, which in their replies had provided extremely valuable information upon the legislation in force in their countries.

Germany, Austria, Belgium, Brazil, and Cuba had given evidence of their good will in this question. Denmark acquiesced in the summoning of a conference, and proposed that a detailed questionnaire should be prepared in which the Governments would be invited to define their views on the question.

Estonia had also sent many detailed suggestions.

Finland, too, was favourable.

The French reply was in point of form somewhat less encouraging, but it might be inferred that France would consent to take part in a conference.

Bulgaria, Greece, and Japan also were favourable, although Japan had made reservations with regard to certain points in the draft.

Norway, while favourable, reserved the right to submit further suggestions later.

The Netherlands Government did not think that a conference was urgently required, but would consent to attend one if called.

Poland was favourable to the Conference, but foresaw certain difficulties in the matter of fiscal immunity.

¹ Also Egypt, whose reply was received after the Committee's Session.

Roumania was prepared to take part in an international conference, and suggested certain restrictions to diplomatic privileges. Special attention was called to the difficulty experienced as a result of diplomatic immunities by tradesmen, bankers, landowners and householders in securing their rights.

Switzerland accepted the proposal and made a large number of suggestions.

The replies received from Czechoslovakia, Salvador, the Kingdom of the Serbs, Croats and Slovenes, Sweden, and Venezuela were also favourable.

To sum up, twenty-two¹ States were explicitly in favour of summoning a conference; two others, the United States and Australia, were favourable in principle, while the British Empire and India were opposed.² The great majority of States which had replied to the questionnaire thought that the subject of diplomatic privileges and immunities merited examination by an international conference.

QUESTIONNAIRE NO. 4.—RESPONSIBILITY OF STATES

ANALYSIS OF REPLIES SUBMITTED BY M. GUERRERO

I. *States that admit the Possibility and Desirability of a Convention on the Question*

A. The following twenty-three States replied affirmatively and without reservations:²

Germany.—"The German Government has examined the questionnaires of the Committee of Experts for the Progressive Codification of International Law transmitted with your letter of March 22nd, 1926, with a view to determining whether the regulation of the subjects treated therein is desirable and realisable in the near future. The German Government considers that the following subjects could be so dealt with:

- "1.
- "2.
- "3. Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners."

Argentine.—"With reference to your book, *La Responsabilidad Internacional*, which you were good enough to send me, I am pleased to inform you that the Ministry of Foreign Affairs, in acknowledging receipt of the copy, which I forwarded in due course, declares that it would view with satisfaction the regulation of this question."

Australia.—"I have the honour, by direction of the Prime Minister, to inform you that the Commonwealth Government considers it desirable to endeavour to secure the regulation by international agreement of all the

¹ The replies from Egypt and Italy, received after the date of Professor Diena's statement, were also favourable.

² Also New Zealand and Haiti whose replies were received after the Committee's session.

subjects dealt with in the questionnaires which accompanied your letter, viz.:

- "1.
- "2.
- "3.
- "4. Responsibility of States in respect of Injury caused in their Territory to the Person or Property of Foreigners;
- "5.
- "6.
- "7.

"To what extent agreement is realisable can only be ascertained by a conference for the purpose of formulating rules which are generally acceptable, but it would appeal to the Commonwealth Government that agreement on many points, if not on all, ought to be attainable.

"The Commonwealth Government is of opinion that the subjects which might be selected for immediate consideration are:

- "1.
- "2.
- "4. Responsibility of States in respect of Injuries to Foreigners."

Belgium.—"In continuation of my letter of October 20th, 1926, in which I replied to the questionnaire on nationality prepared by the Committee of Experts for the Progressive Codification of International Law, I have the honour to inform you that the Belgian Government considers that the settlement by international agreement of the following subjects of international law would also be desirable and realisable at no very distant date.

- "1.
- "2. *Responsibility of States for Damage done in their Territory to the Person and Property of Foreigners* (particular attention should be devoted to defining the grounds on which such responsibility rests to the specifying of the cases in which it is incurred); and to the settlement of disputes which may arise between two States on account of damage done to foreigners in the territory of one of them."

Brazil.—"The questions selected as a commencement of the work of codification are, in our opinion, capable of settlement, and their settlement would be desirable.

"*Responsibility of the State for Injury suffered by Foreigners in its Territory.*—M. Guerrero's conclusions, which have been accepted by the Committee, are excellent on account of the principle they emphasise, namely, that it is the illegal act itself which in international relations creates responsibility, apart from any question of intention."

British Empire.—"In reply to the enquiry contained in your letter (C. L. 25. 1926. V) of March 22nd last in regard to the report of the Committee for the Codification of International Law on the subject of the responsibility of States in respect of injury caused in their territory to the person or property of foreigners, I am directed by Secretary Sir Austen Chamberlain to inform you that His Majesty's Government consider that this is a subject of international law whose regulation, by international agreement, it might be desirable to attempt."

Bulgaria.—"In reply to your letter C. L. 25. 1926, I have the honour to inform you that, in the opinion of the Bulgarian Government, the regulation by international agreement of the subjects treated in the questionnaires is desirable and realisable."

Chile.—"I am directed by my Government to inform you that it has first of all examined Questionnaire No. 4 concerning the responsibility of States for damage done in their territory to the person or property of foreigners. My Government is not yet in a position to forward its replies to the other questions, but instructs me meanwhile to communicate to you the following reply to Questionnaire No. 4, with the request that you will be good enough to transmit it to the Committee of Experts."

"The American doctrine has always been to restrict diplomatic disputes as far as possible, and, since the Fifth Pan-American Conference, conciliation has, in practice, been an essential part of American procedure in international affairs. The Chilean Government, therefore, accepts the conclusions of the report of His Excellency M. Guerrero on the responsibilities of States for damage done in their territories to the person or property of foreigners, with the following explanatory remarks. . . ."

Spain.—"In general, we consider the conclusions in Part VI of the report to be excellent, particularly those in No. 6, 'Legal Protection,' and 7, 'Denial of Justice.' Spanish law accords legal protection on a very liberal scale and the law of civil procedure lays down that civil actions in Spanish territory, between Spaniards, between foreigners, or between Spaniards and foreigners, shall fall exclusively within the ordinary jurisdiction of the courts. As regards denial of justice, Article 27 of the Civil Code extends to foreigners the rights which the civil laws accord to Spaniards, with the exception of the provisions of Article 2 of the Spanish Constitution."

Estonia.—"The principles laid down in the report concerning this question appear to me entirely suitable as the basis of an international convention."

United States of America.—"It is the view of the Government of the United States that international arrangements on the general subjects of: (1) Nationality; (2) Territorial Waters; (3) Diplomatic Privileges and Immunities; (4) Responsibility of States in respect to Injury caused in their Territory to the Person or Property of Foreigners, which are the first four subjects mentioned in the communication of the Secretary-General, would serve a useful purpose and would therefore be desirable, and that there would be no

insuperable obstacles to the concluding of agreements on these general subjects."

Finland.—"If, in regard to the subject dealt with in Questionnaire No. 4, emphasis is laid on the term *damage*, the legislative acts of the State may indeed, as the report assumes, remain outside the limits of the responsibility of States as contemplated in the questionnaire.

"Nevertheless, if we leave out of account the question whether according to domestic law a measure has been rightly or wrongly taken by the public authorities, we may be justified in speaking of the damage done to foreigners even in cases in which the acts of the State that cause this damage come within the province of its legislative functions. According to international law, should acts of expropriation in the widest sense of the term, *i.e.*, acts which infringe an acquired right or render a definitively established situation subject to the effects of a law with retroactive force, be applied indiscriminately to foreigners or do they involve the obligation of paying full compensation to foreigners suffering from the consequences of such acts? The problem is one of tremendous importance and raises questions of great difficulty. This is sufficiently proved by cases such as the agrarian reforms in several countries, the 'Aufwertung' legislation in Germany, etc., not to speak of the radical 'nationalisation' of private property carried out in Russia under the Bolshevik régime.

"Until recent times, writers have maintained with remarkable unanimity that the State is obliged to pay compensation for damage caused by measures of this kind—in other words, the State becomes responsible for damage caused by such legislative acts, so that the State becomes guilty of a breach of international law if it refuses to grant full compensation to foreigners whose interests are affected by a law of the category in question.

"It is only under the influence of a legislation more or less incompatible with these principles that certain authors have begun to question the duty of a State to accord foreigners more favourable treatment in this respect than its own citizens. Be that as it may, this is an extremely important question which deserves to be studied with the greatest care."

Greece.—"The Hellenic Government is of opinion that the settlement of these problems by means of international agreement would, in principle, be desirable."

India.—"I am directed by the Secretary of State for India to inform you that the Government of India consider that the responsibility of States in respect of injury caused in their territory to the person or property of foreigners is a subject of international law whose regulation by international agreement it might be desirable to attempt."

Norway.—"In answer to your request, I have the honour to inform you that the Norwegian Government agrees in the main with the general principles enunciated in Section VI of the Sub-Committee's report, which is at-

tached to the questionnaire, subject to the following observations with regard to certain paragraphs of the conclusions. . . ."

Poland.—"With reference to the questions defined in your note, the Polish Government regards nationality, diplomatic privileges and immunities, the responsibility of States in respect of injury caused to the person or property of foreigners, procedure of international conferences and procedure for the drafting of treaties, exploitation of the products of the sea, and, lastly, piracy, as suitable for codification, and considers such codification both desirable and feasible."

Portugal.—"The Faculty of Law at Lisbon, having been consulted by the Portuguese Government, has replied as follows:

"The Faculty's reply to the first part of this question is in the affirmative, and—to use the terms employed in the circular letter of the Chairman of the Committee—it is of opinion that the settlement of this problem by means of an international convention is desirable and realisable."

Roumania.—"In general, the Royal Government agrees with the Rapporteur's conclusions. It will, however, propose certain amendments when the suggested international conference takes place."

Salvador.—"In reply to your letter C. L. 25. 1926. V, dated March 22nd last to this Department regarding the different questions discussed by the Committee of Legal Experts at the meetings held last January at Geneva, I have the honour to inform you that the only questions in which Salvador is interested are the first six mentioned in the Note of the Chairman of the Committee of Experts for the Progressive Codification of International Law (document C. 96. M. 47. 1926. V, dated February 9th, 1926) and especially the *fourth*, concerning the 'responsibilities of States in respect of injury caused in their territories to the person or property of foreigners.' As regards this matter, we are in full agreement with the ideas set forth in the report on the subject by the Sub-Committee consisting of Dr. J. Gustavo Guerrero and M. Wang Chung-Hui. In the opinion of the Government of Salvador, the regulation by international agreement of these subjects, both in their general aspects and as regards the specific points studied in the relevant reports of the Sub-Committees, is desirable in the near future."

Kingdom of the Serbs, Croats and Slovenes.—"The Royal Government considers that the questions proposed by the Committee should be codified."

Sweden.—"The Swedish Government considers that the question raised in the above questionnaire is of high importance and that it can be settled by means of an international agreement."

Switzerland.—"It would seem to be desirable that some rules as to the responsibility of States for damage done in their territories to the person or property of foreigners should be embodied in an international convention. The existence of definite rules on the subject would doubtless help to lessen the possibility of international conflict."

Czechoslovakia.—"The Government of the Czechoslovak Republic attaches very great importance to the work of the League undertaken in this field. The Government firmly believes that that work will unquestionably result in a very important contribution to the cause of peace, since it will permit of closer collaboration between the countries and forestall many misunderstandings which might otherwise disturb their relations.

"In the present state of the preparatory work the Government thinks that it can confine itself to a brief reply in the affirmative to the question enunciated above and that there is no need to submit an extensive analysis of the different factors of which the matters treated are composed."

B. Four States have replied affirmatively, with certain reservations:¹

Austria.—"The Federal Government agrees that this matter calls for urgent settlement by international agreement.

"It feels bound, however, to state its view that the Sub-Committee has in certain respects departed from the principles of international law as recognised in Europe. Before we can contemplate the preparation of a draft Convention, it would therefore be desirable, with a view to obtaining the accession of the greatest possible number of countries, to examine anew, and with meticulous care, the fundamental principles of the problem.

"Moreover, as this matter is at present being discussed by the Institute of International Law, it would perhaps be desirable to await the results of the work of this body, which enjoys such high repute throughout the legal world."

Cuba.—"As this is another of the questions which will presumably be carefully examined by the Committee of Legal Experts at Rio de Janeiro (and later, in all probability, by the Havana Conference) and as it is of exceptional interest to America, we feel that Cuba should not agree to its settlement by the Committee until the American countries have expressed their final opinion at these Conferences."

Denmark.—"This question seems to be as far-reaching as it is complex; the Danish Government is not quite sure whether the existing body of international juridical practice and scientific theory on this subject is as yet sufficient to allow of general codification. It would, however, be very interesting to make the attempt and see to what extent the question could be settled by means of international conventions. It would perhaps be preferable for the present to refrain from exhaustive codification and confine attention to certain questions of a very special nature. The Danish Government therefore thinks that it would be highly desirable and practical, for the purpose of avoiding dangerous international disputes, to conclude international agreements to the effect that. . . ."

Italy.—"We think that, in principle, and subject to certain reservations, it would be possible to lay down certain general rules in an international convention, bearing in mind, however, the discussions which took place at Gen-

¹ Also Egypt, whose reply was received after the Committee's session.

eva in the Council of the League as a result of the report of the Committee of Jurists on the interpretation of the relevant Articles of the Covenant."

II. *States which do not think that the Conclusion of a Convention is either Possible or Opportune*

Four States:

France.—"Questionnaire 4 (Responsibility of States in respect of Injury caused in their Territory to the Person or Property of Foreigners) too closely affects the internal or the external policy of States, their social life and the stability of their institutions for it to be possible, without serious danger, to propose to establish conventional or general stipulations acceptable by every State in its relations with the other States."

Japan.—"With regard to the reports on Questions 4 and 5, which deal respectively with the responsibility of States for damage done in their territory to the person or property of foreigners, and with the procedure for international conferences and for the conclusion and drafting of treaties, the Imperial Government is inclined to think that these questions are not yet sufficiently ripe to allow of the conclusion of an international convention. It feels, however, that it would be very desirable for representatives of the various countries to examine these questions in common, with a possible view to preparing an agreement, which should, however, contain nothing more than recommendations."

Netherlands.—"With regard to the responsibility of States for damage caused in their territories to the person or property of foreigners, the Netherlands Government feels that, in view of the wide divergence of views on the fundamental legal principles at stake, serious difficulties would be encountered in any attempt to solve the problem."

Venezuela.—"This Ministry has given due consideration to these questions, and has reached the conclusion that, in regard to the following subjects, there exists a body of principles that have definitely secured international acceptance:—Territorial Waters, Piracy, Exploitation of the Products of the Sea, and Diplomatic Privileges and Immunities. These questions would therefore seem to be sufficiently ripe to be considered by international conferences."

Reply promised but not yet received: *Egypt*.

QUESTIONNAIRE NO. 5.—PROCEDURE OF INTERNATIONAL CONFERENCES
AND PROCEDURE FOR THE DRAFTING AND CONCLUSION OF TREATIES

ANALYSIS OF REPLIES SUBMITTED BY M. RUNDSTEIN

It may perhaps be desirable to refer to the intentions of the Committee, as set out in its letter of January 29th, 1926, regarding the question of the procedure of conferences and the conclusion of treaties.

The Committee pointed out that there was no question of attempting to reach, by way of international agreement, a body of rules which would be binding obligatorily upon the various States.

The object of the Committee's investigation was more modest. It was desired to put at the disposal of States rules in the form of *jus dispositivum*, which they could apply or modify as they chose in each concrete case and the acceptance of which might save them much discussion, doubt and delay.

The report submitted to the Governments did not accordingly contain any draft proposals. The Committee was of opinion that the two lists annexed to the report indicating questions for future regulation and possessing the character of questionnaires might prove useful for the preliminary stage of codification.

We shall now indicate the opinions of Governments on the report which was submitted to them for consideration.

In the first place, the Committee has now received *twenty-five* replies. In addition, four countries (Czechoslovakia, Egypt, Portugal¹ and Spain), which submitted their views on other questions, have not yet defined their attitude to the codification of the rules for the procedure of conferences and the drafting of treaties.

Fourteen of these twenty-five replies are definitely in the *affirmative*. They frequently contain new and important suggestions, extending in some cases beyond the scope of the problems referred to in the report.

Five States,¹ while expressing a favourable opinion, make certain reservations, relating in part to the handling of a number of problems not suitable for regulation by convention; at the same time, these States desire to put forward further amendments when an international conference is convened. This heading includes recommendations regarding the necessity of framing a *preliminary draft convention*.

Lastly, *seven* countries replied in the *negative*.²

A full analysis brings out the following points:

I. *Replies in the Affirmative and without Reservations*

Australia	Estonia	Netherlands
Austria	Finland	Norway
Bulgaria	France	Poland
Brazil	Greece	Salvador
Cuba		Switzerland

The following countries declared themselves in favour of immediate codification, but do not make any detailed observations or criticisms:

Bulgaria	Netherlands	(leaving aside all consideration of the urgency of codification)
Brazil		
Greece		
	Poland	
	Salvador	

¹ Also Egypt, whose reply was received after the Committee's session.

² Also New Zealand, whose reply was received after the Committee's session.

There is general acceptance of the Committee's view that the rules to be formulated can only be drafted as a *jus dispositivum*, which would not limit the independence of States (*Austria, Estonia, France, Norway, Switzerland*).

Austria points out that it would be desirable to deal with questions relating to direct and delegated representation. The problem of imperfect ratification and, in particular, ratification subject to reservations has been dealt with in a report by M. Fromageot, which has been accepted by our Committee. It is very doubtful if the question of international agreements concluded orally can form the subject of regulation.

Cuba points out very justly that certain questions mentioned in the questionnaire, such as the definition of international conferences and treaties, seem to be more suitable for theoretical study than for embodiment in a practical convention.

Estonia, while giving a favourable opinion, would desire more-detailed questionnaires since the brief enumeration of certain problems is inadequate. In addition, it believes that the difficulties of interpretation which occur in cases in which a convention is drafted in two or more languages should be settled in explicit terms.

Finland draws special attention to the well-known subject of reservations, and desires regulation of the question whether an amendment to an international conference requires an absolute majority or whether departures from this strict principle should be allowed.

The Government of the *French Republic* which considers that it is desirable and practicable to draw up a body of rules for the use of international conferences and Foreign Offices, points out that it will be necessary to prepare a preliminary draft containing provisions drawn up with some degree of precision.

Switzerland states that the two lists prepared by the Committee appear to be very complete and makes very valuable suggestions regarding the collection of specimen formulas of diplomatic instruments and an investigation into the possibility of simplifying certain obsolete forms. On the other hand, the Federal Council does not approve of the idea of making a collection of constitutional provisions governing ratification of international agreements.

II. Replies in the Affirmative with Reservations¹

Belgium	Roumania
Denmark	Sweden
Italy	

The *Belgian* Government considers that the preparation of a complete code on this subject may perhaps be impossible, but that it should be feasible to draw up a body of rules regarding the drafting of treaties, full powers, signature, ratification, denunciation, etc.

¹ Also Egypt, whose reply was received after the Committee's session.

Denmark is of opinion that it would be sufficient, for the time being, to select for regulation certain questions of special practical importance, viz., the right of unilateral denunciation, interpretation of the most-favoured-nation clause and clauses regarding treatment on the same footing as nationals, the right to make reservations when signing or ratifying an international convention, interpretation of the *Allbeteiligungsklausel*, etc.

The Royal Government of *Italy* thinks that it is possible to adhere to the Committee's suggestions, but it believes that this is not an urgent question.

Roumania, considering that too rigid a body of rules might engender difficulties and disputes, is in favour of the adoption of very broad formulas which could be adapted to all circumstances. She therefore reserves her right to make numerous suggestions on this subject when the proposed international conference is held.

The *Swedish* Government considers that a codification of rules for the procedure of international conferences is not at present necessary, as certain definite customs are now growing up in connection with the conferences convened by the League of Nations. On the other hand, it would be highly desirable to attain a greater measure of uniformity in the rules for the conclusion and drafting of treaties.

The Swedish Government is inclined to think that the best method, for the present, would be for the Committee to prepare drafts which might then be used as models by the various States, and desires the Committee to draw up a project concerning the drafting of international conventions and a draft formula for the clauses which are usually to be found in these conventions.

It is understood that such regulations should not be regarded as a body of obligatory rules, and that the various States would still be free to employ these models or not as they chose.

III. *Replies in the Negative*¹

British Empire	Kingdom of the Serbs, Croats and Slovenes
Germany	United States of America
India	Venezuela
Japan	

The following countries replied in the negative without giving reasons for their decision:

Kingdom of the Serbs, Croats and Slovenes
Venezuela

Germany believes that it would be exceptionally difficult to regulate the matters in question by means of collective agreements. Difficulties may arise owing to differences in the Constitutions of the contracting parties. In addition, such regulations would appear to be premature, as certain

¹ Also New Zealand, whose reply was received after the Committee's session.

substantive questions of international law would first have to be settled. The German Government therefore suggests that treatment of the questions referred to should be postponed for the time.

The *British Empire* (with whose views the Government of *India* associates itself) does not consider the question to be a subject of international law whose regulation by international agreement is desirable and realisable, especially as the Committee itself has pointed out that there can be no question of a body of rules which will be binding obligatorily.

The Government of the *United States of America* holds a similar view and considers that the determination of the procedure of international conferences and the concluding of treaties might well be left to the parties themselves and to the discretion of the delegates representing the respective Governments.

The Imperial *Japanese* Government holds that these questions are not yet sufficiently ripe to allow of the conclusion of an international convention. It feels, however, that it would be very desirable for representatives of the various countries to examine them with a view to preparing an agreement, which should, however, contain nothing more than recommendations.

QUESTIONNAIRE NO. 6.—PIRACY

ANALYSIS OF REPLIES SUBMITTED BY M. MATSUDA

The varied nature of the replies of the Governments to Questionnaire 6 on Piracy renders the preparation of an accurate analysis somewhat difficult. Following the example of a number of my colleagues when discussing the replies from Governments regarding other subjects, I have proceeded by classifying the replies and indicating their nature.

*Twenty-nine*¹ States replied to the questionnaire. Two States—Egypt and Chile—promised to communicate their views on the question, but their replies have not yet been received.

1. Of these twenty-nine States, eighteen recognised the possibility and desirability of an international convention on the question.

These eighteen States fall into two categories. Nine replied in the affirmative: the British Empire, Bulgaria, Cuba, India, the Kingdom of the Serbs, Croats and Slovenes, the Netherlands, Poland, Salvador, and Venezuela. The nine others, while replying in the affirmative, made reservations or observations: Australia, Belgium, Czechoslovakia, Greece, Italy, Japan, Portugal, Roumania, Spain.

2. Three States did not think the regulation of this question was specially urgent or important; they did not, however, object to its being dealt with by international agreement should other States so desire. These three countries are Germany, Brazil, and Sweden. They may therefore be regarded as giving their assent.

¹ Also Egypt and New Zealand, whose replies were received after the Committee's session.

3. Six States refrained for various reasons from putting forward any opinion: Austria, Denmark, Estonia, Finland, Norway, and Switzerland.

4. Finally, two countries—the United States of America and France—replied in the negative or what amounts to the negative.

It should be pointed out that certain countries—Czechoslovakia, Portugal, and Spain—submitted highly interesting observations on the Sub-Committee's report on Piracy. I shall not discuss these observations in detail at present, but I should like to mention that Czechoslovakia, in addition to its observations on the report, put forward a definite suggestion. The reply to the questionnaire contains the following passage:

"Of the seven questions submitted for the opinion of the Governments, three (Nos. 2, 6 and 7) belong to the field of maritime law. Their solution is accordingly of no direct or immediate interest to a continental State like Czechoslovakia. Czechoslovakia's interest in the codification of this branch of the law is practically confined to the general interest felt in the clarification and regulation of international relations as soon as possible and as far as practicable. Any work undertaken on these subjects should therefore, at the present stage of the proceedings, conform, first and foremost, to the opinions based on the experience and needs of maritime States. Nevertheless, the Czechoslovak Government would venture to submit herewith the following suggestion for examination by the Committee.

"The solution of the questions referred to in the questionnaires would perhaps be simpler, more systematic and more profitable if the work of codification contemplated were undertaken from a more general point of view, that is to say, if the three questions and, if need be, any other questions were dealt with in a more general convention, a sort of 'Convention on Maritime Laws and Usages.' Within these wider limits, the regulations proposed for the different individual questions would be seen to derive from certain general principles of law, a fact which would facilitate not only the interpretation of these rules but also their amendment in course of time. We may take a concrete case: the Convention which the Czechoslovak Government has in mind would start by laying down the principle of '*mare res communis omnium*,' so that the freedom of the use of the sea would invariably be presumed, and this general rule would be followed by a statement of exceptions (territorial waters, restrictions on the free exploitation of the products of the sea, etc.). A general convention of this kind could also include an agreement as to penalties. These latter provisions would be followed in logical sequence by an agreement on the suppression of piracy (police measures to be applied in the special case of illicit use of the sea). Finally, the Convention might be concluded with a revision of the conventions on submarine cables, on wireless telegraphy, and on assistance, life-saving and salvage at sea."

In summing up the replies, it will be seen that twenty-one out of twenty-

nine countries approve of regulation by international agreement, two do not approve, and six express no opinion.¹

I beg to submit the foregoing considerations to the Committee, which will decide whether it is desirable under the circumstances to recommend the question of Piracy to the Council as being a subject suitable for regulation by international agreement.

I. States which admit the Possibility and Desirability of a Convention on the Question (eighteen States)

A. States replying affirmatively (nine States):

British Empire.—"I am directed by Secretary Sir Austen Chamberlain to inform you that His Majesty's Government consider that piracy is a subject of international law the regulation of which by international agreement it might be desirable to attempt."

Bulgaria.—"In reply to your letter C. L. 25. 1926, I have the honour to inform you that, in the opinion of the Bulgarian Government, the regulation by international agreement of the subjects treated in the questionnaires is desirable and realisable."

Cuba.—"There can be no objection to the discussion and international settlement of this question, which is of some importance in certain parts of the world."

India.—"I am directed by the Secretary of State for India to inform you that the Government of India consider that Piracy is a subject of international law the regulation of which by international agreement it might be desirable to attempt."

Netherlands.—"As regards the three other questions: (1) Diplomatic Privileges and Immunities; (2) Piracy; and (3) the Procedure to be followed at International Conferences and in the Conclusion and Drafting of Treaties, Her Majesty's Government is of opinion that—leaving aside all consideration of the urgency of codification—these questions have now reached a state at which it should be possible to reach an agreement on the main points."

Poland.—"With reference to the questions defined in your note, the Polish Government regards nationality, diplomatic privileges and immunities, the responsibility of States in respect of injury caused to the person or property of foreigners, procedure of international conferences and procedure for the drafting of treaties, exploitation of the products of the sea, and, lastly, piracy, as suitable for codification, and considers such codification both desirable and feasible."

Salvador.—"In the opinion of the Government of Salvador, the regulation by international agreement of these subjects, both in their general aspects and as regards the specific points studied in the relevant reports of the Sub-Committees, is desirable in the near future."

¹ Also Egypt and New Zealand, whose replies were received after the Committee's session.

Kingdom of the Serbs, Croats and Slovenes.—"With reference to the questionnaire drawn up by the Committee for the Codification of International Law which you forwarded to the Royal Government, I have the honour to inform you, on behalf of my Government, that it considers that the questions proposed by the Committee should be codified."

Venezuela.—"This Ministry has given due consideration to these questions, and has reached the conclusion that, in regard to the following subjects, there exists a body of principles that have definitely secured international acceptance: Territorial Waters, Piracy, Exploitation of the Products of the Sea, and Diplomatic Privileges and Immunities. These questions would therefore seem to be sufficiently ripe to be considered by international conferences."

B. States replying affirmatively but with reservations (nine States):

Australia.—"I have the honour, by direction of the Prime Minister, to inform you that the Commonwealth Government considers it desirable to endeavour to secure the regulation by international agreement of all the subjects dealt with in the questionnaires which accompanied your letter, viz.:

- "1.
- "2.
- "3.
- "4.
- "5.
- "6. Piracy.
- "7.

"To what extent agreement is realisable can only be ascertained by a conference for the purpose of formulating rules which are generally acceptable, but it would appear to the Commonwealth Government that agreement on many points, if not on all, ought to be attainable."

Belgium.—"4. *Piracy.*—The definition by international agreement of the rules applicable to piracy seems to be possible if only actual piracy be considered, to the exclusion of privateering or other ventures of a similar political nature.

"The draft prepared by the Sub-Committee of Experts contains a series of suggestions which could be usefully considered by an international conference."

Spain.—"The rules laid down in the eight articles of the draft Convention for the repression of piracy as modified by M. Matsuda, following on the discussions of the Committee of Experts, are acceptable; but the first of these articles should contain a definition of the term 'piracy vessel.'"

"The deduction to be drawn from the text of Article 1 and the following articles is clearly this: So long as no acts of depredation or violence have been committed, there has been no act of piracy. Consequently, the right of

search and capture defined in Articles 6 and 7 may only be exercised in the case of suspected vessels after it has been proved that acts of piracy have been committed; conversely, vessels which have not committed acts of piracy, though they have been fitted out for the purpose, may not be searched.

"It would therefore seem desirable to add to Article 1 a paragraph stating that a vessel flying no flag, or not legitimately entitled to fly the flag of any State, shall be regarded as a pirate."

Greece.—"The Technical Commission agrees in principle with the Committee of Experts for the Codification of International Law regarding the necessity of establishing an international convention the provisions of which will ensure the suppression of piracy. It also approves the general outline of the Draft Convention drawn up by the Committee, subject to certain observations."

Italy.—"The Royal Government agrees, subject to certain reservations, and provided no matters of doubtful analogy are discussed."

Japan.—"The Imperial Government considers that the reports on Questions 1, 2, 3, and 6, referring to nationality, territorial waters, diplomatic privileges and immunities, and piracy respectively, might provide a satisfactory basis for discussion. It would observe, however, that these reports contain certain points which it could not approve in their present form, and would add that the competent Japanese authorities are at present engaged in a very careful study of these problems."

Portugal.—"The League of Nations Committee of Experts for the Progressive Codification of International Law adopted, at its session held in January, 1926, Questionnaire No. 6, comprising among others the following question:

"Whether, and to what extent, it would be possible to establish by an international convention appropriate provisions to secure the suppression of piracy."

"This question was referred to a sub-committee, whose conclusions were embodied in a report signed by M. Matsuda. The Portuguese Permanent Commission has very carefully considered this report on which it presents the following comments.

"The report shows a thorough knowledge of the general doctrine on the subject. There are, however, certain doubtful points to which the Portuguese Commission thinks it well to draw attention.

"The report (A, I) says that piracy has as its field of operation only the high seas; the inference is that the same acts, committed in the territorial waters of a State, do not fall under international law. But history teaches that the attacks of pirates in ancient times and in the Middle Ages were almost always committed near the coasts, and that, generally, the pirates landed and attacked villages, plundering, looting, and murdering, and kid-

napping the inhabitants. It was thus that the Norman pirates acted on the western coasts of Europe, and later the Barbary pirates in the Mediterranean, though the latter, it must be said, preferred to attack on the open sea. It is true that nowadays piracy in either form has become rare. But from time to time piratical acts are still committed, either on the high seas or on the coasts, especially in the Far East, and there appears to be no great difference in the gravity of the offence wherever the scene of the robbery.

"As regards the suppression of piracy, the report quite properly says (Article A, II (2)) that, if a vessel is only under suspicion, a warship is authorised to verify its true character. But it adds that, if the suspicion proves to have been unfounded, the captain of the suspected vessel is entitled to reparation or compensation according to circumstances. This right had perhaps better not be established. It may be assumed that the commander of a warship does not act without due consideration; though doubtless cases may occur in which his suspicions prove to be unfounded. Just as, in time of war, a belligerent searches a neutral vessel, and, that vessel's neutrality having been established, no reparation is due to it on account of the delay in the voyage, here also it would seem that the delay of the ship would be sufficiently compensated for by the sense of security afforded by the navy's vigilance.

"The report goes on to deal (B) with acts which it classifies as piracy in accordance with treaties or the laws of individual States.

"Among these acts the report cites (I), in the first place, privateering. It seems to admit the legality of privateering in certain circumstances. But the Declaration of Paris of 1856 expressly lays down: 'Privateering is and shall remain abolished.' Accordingly, privateering is illegal, at any rate for States which signed or adhered to the Declaration. In perhaps the most recent work on international law, *International Law for Naval Officers*, published at Annapolis in 1925, we find (page 96): 'Privateering was abolished by the Declaration of Paris, 1856.' Moreover, the participation of merchantmen in operations of war is regulated by the 7th Convention of the Hague Peace Conference of 1907, which legalised the existence and action of *converted ships*. Such ships, which are placed on exactly the same footing as warships, were largely used in the late war, and therefore the theory of the legal existence of privateers is no longer admissible.

"*A fortiori*, it seems impossible to admit, as is suggested in the report (B, 2), that a vessel which, while its own country remained neutral, had received a commission from a foreign belligerent State, might capture vessels belonging to a Power which, while an enemy of that State, was at peace with the vessel's own country. Obviously such a ship would have to be considered a pirate.

"Quite possibly some of the above objections have already been raised in the Committee of Experts, as most of the points referred to do not appear in

the draft Provisions. In a general way, the Portuguese Permanent Commission accepts the draft, subject to the following remarks, which it submits for the attention of the Committee of Experts.

"Article 1.—Add after the words 'the high sea' the words 'or on the coasts.'

"Article 2.—Add at the end: 'and accordingly the right to continue to fly that flag.'

"Article 4, paragraph 2.—The application of the second part of this paragraph: 'unless these acts are inspired by purely political motives,' might give rise to awkward discussions; perhaps it would be better to omit these words.

"Article 6.—Omit the words 'if after examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity as the case may be.' If this omission is adopted, the words 'on the contrary' in the paragraph following will have to be omitted."

Roumania.—"1. Is piracy an important problem to-day? That is the essential question which must be answered before we proceed to consider the draft prepared by the Sub-Committee for the Progressive Codification of International Law.

"If we simply adopt the traditional conception as accepted in most works and monographs on the subject, we cannot help asking ourselves whether the Committee of Experts ought not rather to have dealt with other problems which are of greater importance to the world to-day but do not appear in the list of subjects of international law which the Committee drew up with a view to their settlement by international agreement.

"If, however, we take a broader view of the question, we must admit that, in view of future developments as regards the character of the measures of suppression, the Committee of Experts has shown great foresight in including piracy in this list."

Czechoslovakia.—"Of the seven questions submitted for the opinion of the Governments, three (Nos. 2, 6 and 7) belong to the field of maritime law. Their solution is accordingly of no direct or immediate interest to a continental State like Czechoslovakia. Czechoslovakia's interest in the codification of this branch of the law is practically confined to the general interest felt in the clarification and regulation of international relations as soon as possible and as far as practicable. Any work undertaken on these subjects should, therefore, at the present stage of the proceedings, conform, first and foremost, to the opinions based on the experience and needs of maritime States. Nevertheless, the Czechoslovak Government would venture to submit herewith the following suggestion for examination by the Committee.

"The solution of the questions referred to in the questionnaires would perhaps be simpler, more systematic and more profitable if the work of codification contemplated were undertaken from a more general point of

view, that is to say, if the three questions and, if need be, any other questions, were dealt with in a more general convention, a sort of 'Convention on Maritime Laws and Usages.' Within these wider limits, the regulations proposed for the different individual questions would be seen to derive from certain general principles of law, a fact which would facilitate not only the interpretation of these rules but also their amendment in course of time. We may take a concrete case: the convention which the Czechoslovak Government has in mind would start by laying down the principle of '*mare res communis omnium*,' so that the freedom of the use of the sea would invariably be presumed and this general rule would be followed by a statement of exceptions (territorial waters, restrictions on the free exploitation of the products of the sea, etc.). A general Convention of this kind could also include an agreement as to penalties. These latter provisions would be followed in logical sequence by an agreement on the suppression of piracy (police measures to be applied in the special case of illicit use of the sea). Finally, the Convention might be concluded with a revision of the conventions on submarine cables, on wireless telegraphy, and on assistance, life-saving and salvage at sea.

"With regard, in particular, to the draft provisions for the suppression of piracy, annexed to the Sub-Committee's report, it might perhaps be advisable, in order to prevent abuse of the powers conferred on commanders of warships, to stipulate that the State which has effected the capture of a pirate shall be bound to notify forthwith the State in whose register the captured ship appears. Arbitration proceedings might be usefully provided for in case of disputes."

II. *States which, though not opposed to the Solution of the Question, do not see any Urgent Necessity for it or find the Question one of Limited Interest*
(three States)

Germany.—"There is, in the opinion of the German Government, no urgent need for at once undertaking the general international regulation of the question of Piracy. Nevertheless, Germany would raise no objections of principle to such regulations being attempted, should the League consider this step necessary. In that case, the German Government would reserve its right to submit its views on the various provisions in the draft of the Committee of Experts."

Brazil.—"Although Piracy, which M. Matsuda has examined and defined as a question of international law, is at present of very limited interest, there is no reason why it should not be suppressed by international action. I must admit that this crime, which is extremely rare in the Western Hemisphere, seems to me to be hardly worth consideration outside the penal codes of each country."

Sweden.—"The Swedish Government has the honour to state that it does

not consider the question of piracy to be one of the most urgent matters requiring settlement by international agreement. Should other Powers, however, desire such an agreement, the Swedish Government would not have any objection to this question being dealt with, with a view to the establishment of international rules."

III. *States having refrained from expressing any Opinion (six States)*

Austria.—"As Austria is not a maritime Power, the Federal Government refrains from giving any opinion on the questions dealt with in Questionnaires 2 (Territorial Waters), 6 (Piracy) and 7 (Exploitation of the Products of the Sea)."

Denmark.—"The Danish Government has no observations to offer on this point."

Estonia.—"Estonia has no observations to make on this point, which, as far as she is concerned, is not a question of primary importance."

Finland.—"With regard to Questionnaires Nos. 6 and 7, the Finnish Government has no observations to make."

Norway.—"In pursuance of your request, I have the honour to inform you that, as the question does not directly concern the Royal Government, it does not feel called upon to pronounce upon the desirability of establishing an international convention on the matter."

Switzerland.—"As regards the other questionnaires, we have noted their contents with interest, but, as the problems with which they deal are of only very indirect concern to our country, the Swiss Government, at least for the present, does not feel itself called upon to express any views concerning them."

IV. *States which do not think the Conclusion of a Convention either Possible or Desirable (two States)*

United States of America.—"With regard to the sixth subject enumerated in the communication of the Secretary-General, namely, Piracy, it is the view of the Government of the United States that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement."

France.—"Finally, Piracy, dealt with in document No. 6, would seem at first sight to be a matter on which a general agreement would be desirable and practicable. But if the question is examined from the practical and political point of view, it will be found that the condition of establishing a general regulation on such a matter would be that every contracting State should possess a police organisation and powers of supervision and jurisdiction over its own flag which could be recognised by the other States. No general regulation seems desirable until this condition is everywhere fulfilled."

QUESTIONNAIRE No. 7.—PRODUCTS OF THE SEA

ANALYSIS OF REPLIES SUBMITTED BY M. BARBOSA DE MAGALHAES

Before beginning to classify and co-ordinate the replies from Governments on the subject of the Exploitation of the Products of the Sea, we desire to refer to the conclusions in the admirable report which our colleague, Professor Suarez—whose absence we all regret—submitted to the Committee, and which the Committee transmitted to the Governments.

His conclusions are as follows:

1. That it is possible, by means of adequate regulation, to secure the economical exploitation of the products of the sea.
2. That such regulation could not fail to be in the general interest, since, if the present confusion persists for a few years longer, the extinction of the principal species will be the inevitable consequence of their unrestricted exploitation.
3. That the treaties dealing with the subject apply only to certain species and are for the most part regional in character. They have not always taken into account the point of greatest importance to humanity, which is to find means to prevent the disappearance of species, and not infrequently they concern measures of police or purely commercial measures, without considering the biologico-economic aspect, which is the essential aspect.
4. That the attention of all maritime Powers should be called to the urgency of establishing regulations by holding a conference including experts in applied marine zoology, persons engaged in marine industries, and jurists.
5. That, without prejudice to other matters, the general technical programme of the conference referred to in the previous paragraph might include the following:

- (a) General and local principles for the organisation of a more rational and uniform control of the exploitation of the aquatic fauna in all its aspects;
- (b) Creation of reserved zones, organisation of their exploitation in rotation, close periods and fixed ages at which killing is permitted;
- (c) Determination of the most effective method of supervising the execution of the measures adopted and maintaining the control.

In transmitting these conclusions, the Committee, after stating that it had decided to include in the list of subjects the regulation of which by international agreement would seem to be most desirable and realisable at the present moment the question "whether it is possible to establish, by way of international agreement, rules regarding the exploitation of the products of the sea," drew attention to the following considerations:

"The practical importance of the question appears to be established by this report and is emphasised in the conclusions which are there reached. The Committee considers that the report indicates in broad

outline the problems which a conference including experts of various kinds might be called upon to solve, and feels it a duty to emphasise the urgent need of action."

Generally speaking, the replies from Governments approve the conclusions of the report, and nearly all the replies, including even some of those which are unfavourable, recognise the importance of the question and the necessity of regulation by means of a general international convention.

There are, in addition, a number of replies which are highly encouraging.

Twenty-eight Governments forwarded replies.¹ Of these twenty-eight Governments, two—the Austrian and Swiss Governments—stated that they would refrain from expressing their opinion since their countries were not maritime Powers and therefore were only indirectly interested in the solution of the problem.

Twenty-one Governments gave affirmative or favourable answers—those of Australia, Belgium, Brazil, Bulgaria, Cuba, Czechoslovakia, Denmark, Estonia, Finland, France, Greece, India, Italy, Poland, Portugal, Roumania, Kingdom of the Serbs, Croats and Slovenes, Spain, Sweden, the United States and Venezuela.

*Five*² Governments gave replies which are unfavourable or opposed to the conclusions: the British Empire, Germany, Japan, the Netherlands and Norway.

These unfavourable replies express different views.

The German and Norwegian Governments point out that the problem has been dealt with for many years past by the international oceanographical associations, and in particular by the International Council for the Exploration of the Sea, at Copenhagen. The German Government accordingly "would be glad if, in the first place, the Central Committee of the above-mentioned Council and the other international oceanographical organisations were given an opportunity to state their views on the subject." In the opinion of the Norwegian Government, "it would be best to await the results of the researches of the International Council referred to above."

The British and Japanese Governments are opposed to any regulation by general agreement, and the former Government even considers that this is not a subject the regulation of which by international agreement is feasible.

The Netherlands Government, while stating that it "is extremely anxious that an international agreement should be reached on this subject," considers that "the problem is not primarily a legal one, but economic and commercial," and is not sure "whether it would not be preferable to refer this question to the Economic Committee of the League, which might examine it in conjunction with the Permanent International Council for the Exploration of the Sea, at Copenhagen." The Netherlands Government goes on to say:

¹ Also Egypt and New Zealand, whose replies were received after the Committee's session.

² Also New Zealand, whose reply was received after the Committee's session.

"In this connection, the Netherlands Government ventures to point out the desirability of international legislation for the protection of the *pieuronectidæ*. The Permanent International Council has already taken up this question, but it does not seem yet to have obtained any tangible results."

Among the affirmative replies, mention should be made of those from the Governments of India and Finland, which merely state that they have no observations to submit; the reply from the Portuguese Government, which "takes the view that, apart from special cases which should be dealt with by the States directly concerned, the only general measure necessary is the extension of territorial waters, for fishery purposes, to twelve or fifteen miles," and has no objection to the summoning of the conference of technical experts suggested in Professor Suarez' report so that there is even reason to believe that it would give its consent, as the conference in question would be the body best fitted to advocate the measure contemplated in the Portuguese Government's reply, and also other measures which that Government, in its statement of reasons, considers might be taken on this question, the importance of which it fully appreciates; the reply of the Belgian Government, which states that it would have no objection to participating in an effort to settle this question by international agreement, on the understanding, however, that an enquiry into this very special question could not be conducted satisfactorily without the assistance of the International Council for the Exploration of the Sea; the reply of the United States Government, which considers: "(1) that international regulation of certain fisheries, such as those for whales, is desirable and should be realisable; (2) that information as to the status of fisheries for most of the true fishes is not sufficiently complete to admit of the formulation of regulations at the present time; (3) that in most cases particular fisheries may best be regulated by treaties between the nations most directly concerned; (4) that investigations to determine the need for and character of regulations to sustain the various fisheries should be encouraged; and (5) that an international conference is desirable to consider the problem of conserving the whale;" and the reply from the Swedish Government, which, while pointing out "that there has been in existence, since 1902, a Permanent International Council for the Exploration of the Sea, and that fourteen European States, including Sweden, have adhered to this organisation, which was created on the assumption that it would be impossible to establish international rules for the fishing or catching of certain maritime species until careful scientific research had shown that fishing or catching so seriously affected the existence of these species as to warrant their protection by international measures," holds that "there are various reasons in favour of convening an international conference of experts to examine the question of the protection of the above-mentioned species in regions where they are threatened with extermination."

It adds that:

"In conformity with the conclusions of the Committee's Rapporteur, it will not be necessary from the outset to limit the programme of this con-

ference to the above question nor, generally, to certain States, regions or maritime species. The Swedish Government is of opinion that it would be desirable to lay down a general rule to the effect that the conference would only draw up draft international rules in cases where such rules were shown to be obviously and immediately necessary. It does not, therefore, think, as the Rapporteur suggests, that the conference should concern itself above all with preparing a draft the object of which would be to organise a system for the supervision of the exploitation of maritime fauna in all its aspects. The Swedish Government does not consider that such a draft is in any way necessary from a practical point of view. It would be preferable for the conference to consider each individual species separately, in the manner indicated above, and study the various geographical regions separately."

The reply of the Czechoslovak Government, in referring to the three questions of maritime law submitted to the various Governments (Territorial Waters, Piracy and Products of the Sea), put forward the following suggestion for the consideration of the Committee:

"The solution of the questions referred to in the questionnaires would perhaps be simpler, more systematic and more profitable if the work of codification contemplated were undertaken from a more general point of view, that is to say, if the three questions and, if need be, any other questions were dealt with in a more general convention, a sort of 'Convention on Maritime Laws and Usages.' Within these wider limits, the regulations proposed for the different individual questions would be seen to derive from certain general principles of law, a fact which would facilitate not only the interpretation of these rules but also their amendment in course of time. We may take a concrete case: the convention which the Czechoslovak Government has in mind would start by laying down the principle of *mare res communis omnium*, so that the freedom of the use of the sea would invariably be presumed and this general rule would be followed by a statement of exceptions (territorial waters, restrictions on the free exploitation of the products of the sea, etc.). A general convention of this kind could also include an agreement as to penalties. These latter provisions would be followed in logical sequence by an agreement on the suppression of piracy (police measures to be applied in the special case of illicit use of the sea). Finally, the convention might be concluded with a revision of the conventions on submarine cables, on wireless telegraphy, and on assistance, life-saving and salvage at sea."

In conclusion, the most encouraging replies are from the Danish, French and Roumanian Governments.

The Danish Government states that it "has read the excellent report accompanying this questionnaire with great interest," and "considers that the question dealt with therein is of high practical importance and would be very glad if this question could be satisfactorily settled in an international convention."

The French Government's reply should be examined in its entirety. The letter in which His Excellency the Secretary-General of the Ministry of Foreign Affairs transmitted his Government's reply is as follows:

"You expressed the desire, etc. . . ."

"In conformity with the indications you gave me, I should like to mention first the question of the Exploitation of the Products of the Sea (the subject of Questionnaire No. 7), as, in the French Government's opinion, it is desirable, practicable and urgent to regulate this matter by international agreement. It would seem, moreover, that every country must have the same interest as France in preventing the extinction of marine animals in the near future and in putting an end to the reckless slaughter reported from different quarters, particularly in the South Seas and, more recently, on the coasts of Gaboon. The question is already under serious consideration by our ministries concerned; they agree that a conference convened to study this question could without undue difficulty conclude a general convention, as indeed has already been done in Africa for the protection of the fauna of that continent, in Europe for the protection of birds useful to agriculture, and in the Northern Pacific between the Powers concerned in regard to fur-bearing seals.

"I should therefore be very grateful if you would inform the Committee of Experts that the French Government attaches special importance to this question, and would ask it if the preliminary procedure could not be accelerated in order that a conference may be summoned as soon as possible."

The Roumanian Government concludes its long and very interesting statement as follows:

"The stages in the League of Nations work might be as follows:

"1. A conference of experts in applied biology, economists and international law experts of all States possessing maritime interests should be convened. This conference would discuss and establish fundamental principles, the programme of detailed enquiries and means of application, the institution of the central research institute and the manner in which the latter should collaborate with existing institutions of all countries—that is to say, biological and oceanographical institutes, zoological stations, fishery services, institutes of social economy, etc.

"2. The organisation of the central research institute with a view to collecting and co-ordinating data, directing the continuation of research work, stating problems and preparing all material for the final solution.

"3. A new conference should then be convened to discuss and adopt the final solution.

"4. The new body of law thus created would be codified.

"We think that in this way the League of Nations would be able, in a relatively short space of time, to solve one of the greatest problems for the future of humanity and achieve in this respect the noble aim for which it was created."

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

GENERAL REPORT ON PROCEDURE*

Adopted by the Committee at its Third Session, held in March-April 1927

The resolution adopted by the Assembly on September 22nd, 1924, defined most specifically the terms of reference of the Committee of Experts which the Council was to convene. The Committee was instructed to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment and, after communication of the list to the various Governments for their opinion, to examine the replies received and to report to the Council:

- (a) On the questions which were sufficiently ripe; and
- (b) On the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee communicated to the various Governments, after its meeting in January 1926, a list of seven subjects the regulation of which by international agreement it regarded as presently desirable and realisable. Replies have been received on some or all these subjects from about thirty Governments. Twenty-eight Governments have replied to Question 1: Nationality; twenty-nine to Question 2: Territorial Waters; twenty-seven to Question 3: Diplomatic Privileges and Immunities; thirty-one to Question 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners; twenty-six to Question 5: Procedure of International Conferences, etc.; twenty-nine to Question 6: Piracy; and twenty-eight to Question 7: Exploitation of the Products of the Sea. Two States are opposed to the consideration of the first subject; three to the second; two to the third; four to the fourth; seven to the fifth; two to the sixth; and five to the seventh—either on the ground that the best method of dealing with those subjects is by special treaties or on the ground that certain existing bodies already have the problem under consideration.¹

In fulfilment of its mandate, the Committee has reported to the Council on the questions which are held to be sufficiently ripe.²

* Publications of the League of Nations. V. Legal. 1927. V. 2.

¹ These figures do not take account of the replies received after the Committee's session, namely, from Egypt, which replied to all seven questionnaires and, subject to certain observations in regard to the first five, offered no objection to the consideration of any of the seven subjects; from Guatemala, which promised a reply later; from New Zealand, which desired to be associated with the replies forwarded by Great Britain; from Turkey, which desired "at present only to follow the course of the work carried out" and to receive any further documents published on the subject; and from Haiti which, confining its reply to the question of the Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners," raised no objection to the consideration of that subject.

² See document printed *supra*, p. 4.

The Committee has now, in accordance with its terms of reference, to propose the procedure which should be followed with a view to preparing eventually for conferences for the solution of these questions.

Obviously, the work of the conferences must be so prepared as to facilitate and shorten their task. With regard to The Exploitation of the Products of the Sea and The Procedure of Conferences and Procedure for the Conclusion and Drafting of Treaties, the question of procedure presents certain special aspects; the Committee will revert to this point later.

Speaking generally, the questions to be solved must first be specified and communicated to the Governments concerned, in order that the latter may, if they so desire, communicate their observations in good time. These observations should be collected and classified, and then submitted to the delegates. The most satisfactory method would doubtless be to prepare complete drafts which might be used as a basis for discussion and to which the delegates would propose amendments when their opinion differed from the terms of the draft.

It might seem natural that the Committee of Experts should prepare, for each question, drafts of this kind embodying the solutions which they would desire to recommend. But experience gained at the 1926 session shows that this method would require far more time than the Committee could spare; in this connection, it may be remembered that the budget voted for the Committee by the Assembly only provides for one session in the year. The Committee, however, may refer to the drafts attached to most of the questionnaires which it has sent to the various Governments. In principle, the solutions suggested in these drafts only express the opinion of the Rapporteurs or Sub-Committees, but they may nevertheless prove acceptable as a basis for discussion. The Committee has only had the duty, and has only been able, to give an opinion as to the desirability and possibility of formulating rules for the questions mentioned in these drafts.

The use of these drafts as a basis for discussion in conferences would present a special advantage from the practical point of view. Governments which, in reply to the Committee's questionnaires, have already offered detailed comments might, if they wished, simply refer to these comments, whereas other Governments might base their observations thereon. The Committee feels that the replies to the questionnaire should, in any case, be communicated to all the Governments invited to the conferences.

Should these drafts, however, be held to offer an inadequate basis for discussion, the only course would be to call upon qualified persons, institutions or committees to draw up new drafts. The Committee is convinced that the former Rapporteurs and even other members of its Sub-Committees would willingly place their services at the disposal of the Council for this purpose should the Council desire their assistance.

With regard to the questionnaires to which no drafts were attached, the

problem is similar. If, contrary to the procedure adopted at certain conferences, a list of the questions to be solved or a purely interrogative questionnaire is held to be insufficient, it will be necessary to prepare drafts within the framework of such lists or questionnaires. The Committee of Experts feels it has accomplished its mission in this respect by indicating, in as detailed a manner as is necessary and possible, the questions which, in its opinion, might be settled by international agreement.

The Committee would also wish to draw the attention of the Council to the importance of preparatory work in the form of collecting and classifying all the historical, legislative and scientific data which may be of interest to the contemplated conferences. It does not consider itself competent to offer an opinion as to whether it may be necessary for the Council to consider the creation of a special organ for this purpose.

As regards the official conferences, two theories may be considered and it might be recommended: (1) that a conference be convoked upon each of the subjects considered ripe for international agreement; or (2) that a single conference be called to consider all the topics recommended.

The latter would seem to be the most practical course from every point of view. Official international conferences are not easily convoked or resolved upon. A call for a general Conference on the Codification of International Law would respond to a very widespread present interest in that subject.

If four or five of the subjects recommended by the Committee as ripe for international agreement were specified in the invitation, the various Governments could select delegates possessing the various qualifications appropriate to rendering the most effective service in treating the subjects—not merely jurists but economists, statesmen and men familiar with questions of commerce and shipping. Such a conference might, and probably would, divide itself into sections, each properly constituted for the consideration of a particular question.

The same number of delegates might be sent by each State to such a general conference as would normally be required for each of the special conferences summoned for the respective subjects recommended, with a resulting economy which might, and doubtless would, appeal to some, if not all, of the States. The Committee does not, however, attach paramount importance to this question.

Having regard to the above considerations, the Committee, in reporting to the Council of the League of Nations as to the questions which, in its opinion, are ripe for international agreement, recommends to the Council:

1. That the Council convoke a single official conference or, as the case may be, two or several conferences of all the States, whether or not Members of the League of Nations, to consider and take action with respect to the formulation and submission to their various Governments of gen-

eral treaties embodying provisions relating to such subjects as may be agreed upon by such official conferences;

2. And that the conference or conferences should be prepared in the manner indicated above.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS ON THE PROCEDURE TO BE FOLLOWED IN REGARD TO THE QUESTION OF THE PROCEDURE OF INTERNATIONAL CONFERENCES AND THE PROCEDURE FOR THE CONCLUSION AND DRAFTING OF TREATIES *

(QUESTIONNAIRE No. 5)

*Adopted by the Committee at its Third Session, held in March
and April 1927*

In its general report on the question of procedure,¹ the Committee emphasised the necessity of taking certain preparatory measures with a view to facilitating and shortening the work of any conferences that may be held.

This necessity appears particularly great as regards the question of conferences, since the report approved by the Committee is accompanied neither by a draft nor by a questionnaire in the proper sense of the term, and since the matter in question is, in a certain sense, highly technical.

The Committee would recommend to the Council that the subject should first be examined by a small Committee of Experts. Such a preliminary measure may, it is true, seem costly, unless the Committee could be composed of Secretariat officials already possessing wide experience of conferences and the conclusion of treaties. The Committee would venture to point out, however, that the results of the work of the Conference of Experts would in any case be of great value. Even if the drafts framed by it were not accepted by a conference of all the States, they would be most valuable as models. It would be possible, at the beginning of a conference or of negotiations in respect of any treaty, to adopt en bloc the rules contained in such drafts; this would prevent the loss of time entailed by detailed discussions concerning the procedure to be followed.

The Committee would point out in this connection that even drafts accepted on this subject by a conference of all the States would simply be in the nature of *droit dispositif*, that is, of rules which would leave the parties concerned quite free to come to some different arrangement.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

* Publications of the League of Nations. V. Legal. 1927. V. 3.

¹ See document printed *supra*, p. 39.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS ON THE PROCEDURE TO BE FOLLOWED IN REGARD TO THE QUESTION OF THE EXPLOITATION OF THE PRODUCTS OF THE SEA*

(QUESTIONNAIRE No. 7)

*Adopted by the Committee at its Third Session, held in March
and April 1927*

On the question of the Exploitation of the Products of the Sea, the Committee, in its general report on the question of procedure,¹ has recognised the necessity of proposing a special procedure to the Council. This is not merely necessitated by the extremely technical nature of the subject: it is also in conformity with the recommendations of the report submitted to the Governments and with the replies received.

These recommendations propose that a conference should be convened which should comprise experts in the subject of applied maritime zoology, representatives of the marine products industries, and jurists. The replies received show, first, that the question must be studied at greater length and in greater detail if we are to arrive at a settlement by international agreement; secondly, that such regulation might be carried on and developed in the case of a certain number of less migratory species of maritime fauna, by means of bilateral and multilateral conventions, and, in the case of other more migratory species, such as the whale, by means of a general convention; and, finally, that the conference of experts is the proper body to formulate an opinion on these problems and on many other problems arising from this question, and also on the best method of formulating rules without undesirable delay.

Several Governments pointed out in their replies that the subject has been studied for some years by international oceanographical organisations, and in particular by the Permanent International Council for the Exploration of the Sea at Copenhagen. They consider that we ought to avail ourselves of the co-operation of these organisations.

The Committee readily adopts this suggestion. Declaring that the exploitation of the products of the sea is one of the subjects the regulation of which by international agreement appears to be most desirable and realisable, and once again emphasising the urgency of the measures to be taken, the Committee proposes to the Council to begin by submitting the question to the above-mentioned conference for examination. This Conference should

* Publications of the League of Nations. V. Legal. 1927. V. 4.

¹ See document printed *supra*, p. 39.

include not only experts in applied maritime zoology, representatives of the marine products industries and jurists but also representatives of the above-mentioned international organisations, and, in particular, of the Copenhagen Permanent Council. Its general technical programme, to which other items may be added, might be as follows:

(a) To establish general and local basic rules for the organisation of a more rational and uniform system of supervising the exploitation of maritime fauna in all its aspects;

(b) To reserve zones and organise a system of alternating exploitation; to fix close seasons or to fix age-limits under which the various species may not be caught or hunted;

(c) To determine the most effective method of establishing and maintaining supervision over the application of the measures adopted;

(d) To determine the most suitable form of total or partial international regulation of the subject, and draw up, if necessary, a general draft convention or a series of multilateral draft conventions.

Further, the Committee ventures to suggest to the Council that the preparations for the Conference might be entrusted either to the Economic Committee of the League of Nations or to the Copenhagen Permanent Council.
Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

(QUESTIONNAIRE No. 8)

Adopted by the Committee at its Third Session, held March-April 1927

COMMUNICATION OF JUDICIAL AND EXTRA-JUDICIAL ACTS IN PENAL MATTERS AND LETTERS ROGATORY IN PENAL MATTERS*

The Committee has the following terms of reference:

- (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following question:

"Is it possible to establish, by means of a general convention, provisions concerning the communication of judicial and extra-judicial acts (*actes judiciaires et extra-judiciaires*) in penal matters and letters rogatory in penal matters?"

On this subject the Committee has the honour to communicate to the Governments a report submitted to it by a Sub-Committee consisting of M. SCHÜCKING, Rapporteur, and M. DIENA. The report comprises a memorandum by the Rapporteur, to which is appended a draft of a convention. The text of this draft has been modified by the Sub-Committee as the result of its discussion by the Committee of Experts.

The nature of the general question and of the particular questions involved therein appears from the report. The latter contains a statement of principles to be applied and of the solutions of particular questions which follow from those principles. The Committee regards this statement as indicating the questions which require to be solved in order to deal with the matter by way of an international agreement. All these questions are subordinate to the larger question set out above.

It is understood that, in submitting this subject to the Governments, the Committee does not pronounce either for or against the general principles set out in the report or the solutions proposed on the basis of these principles for various particular problems. At the present stage of its work it is not

* Publications of the League of Nations. V. Legal. 1927. V. 6.

for the Committee to put forward conclusions of this character. Its sole, or at least its principal, task at present is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

In doing this, the Committee should doubtless not confine itself to generalities but ought to put forward the proposed questions with sufficient detail to facilitate a decision as to the desirability and possibility of their solution. The necessary details are to be found in the draft convention above mentioned (see page 28).

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before December 31st, 1927.

The Sub-Committee's report and the draft convention above-mentioned are annexed to the present communication.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: Professor SCHÜCKING.

Member: Professor DIENA.

"Is it possible to establish, by means of a general convention, provisions concerning the communication of judicial and extra-judicial acts in penal matters and letters rogatory in penal matters?"

[Translation.]

INTRODUCTION

DEFINITION OF THE PROBLEM

At its second session, held at Geneva, the Committee of Experts for the Progressive Codification of International Law appointed a Sub-Committee—of which I had the honour to be made Rapporteur—to consider whether and how far it would be desirable and possible to conclude a convention concerning "the communication of judicial and extra-judicial acts and letters rogatory in penal matters."

The question was formulated in the same terms as those used for the titles of the first two chapters of the Convention on Civil Procedure concluded at The Hague on November 14th, 1896, namely:

- (1) Communication of Judicial and Extra-judicial Acts;
- (2) Letters Rogatory.

It is true that the title of the Convention on Civil Procedure differs slightly from the terms in which the question submitted to me was formulated: the

Convention of 1896 is called a "Convention relating to *Civil Procedure*," whereas the question on which I have been asked to report refers to communications and letters rogatory "*in penal matters*." I do not regard this difference between the two formulas as of material importance. I have assumed that the question under consideration is confined to judicial co-operation in matters of procedure, and that the only difference between the subject with which I am dealing and the subject of the above-mentioned Hague Convention lies in the fact that the latter deals with judicial co-operation in *civil* procedure, whereas the subject I have been asked to consider relates to judicial co-operation in matters of *penal* procedure.

It is in this sense, and within these limits, that the problem is usually treated in textbooks and monographs on the subject.

VON MARTITZ: *Internationale Rechtshilfe in Strafsachen*, Vol. 2; LAMMASCH: *Auslieferungspflicht und Asylrecht*, Appendix; MEILI: *Lehrbuch des internationalen Strafrechts und Strafprozessrechts*; MONIER: *Les Commissions rogatoires en droit international* (Paris, 1909) (see also, in the latter, bibliography of previous French works on the subject); L. GESTOSO Y ACOSTA: *Nuevo Tratado de derecho procesal, civil, mercantil*; see also BREGEAULT: *De l'audition en matière criminelle des témoins en pays étranger* (Paris, 1878). Further information may be found in textbooks and monographs on extradition law, which deal incidentally with questions of international judicial co-operation. As regards judicial co-operation in international civil procedure, the only book of reference is the comprehensive work of MEILI and MAMELOCK: *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen*.

My examination of the problem was to a certain extent restricted by the fact that the Committee of Experts had previously decided that a kindred subject connected with international penal procedure, namely, the law of extradition, was not ripe for immediate codification. Accordingly, I have had to exclude certain questions which are on the border-line of the two subjects, *e. g.*, the question of the passage in transit of persons under arrest across the territory of a third country (so-called "provisional" extradition). In the report of the Committee of Experts, this matter was treated as a question of extradition law (see Report on Extradition, 4 (1)), whereas in technical works it is often included under judicial co-operation in penal matters, even when such co-operation is taken in its strict sense as excluding the laws of extradition (See MEILI, *op. cit.*, page 374, and in particular LAMMASCH, pages 702 *et seq.*).

I. THE PRINCIPLE OF THE OBLIGATORY CHARACTER OF JUDICIAL CO-OPERATION IN PENAL MATTERS AND THE RECOGNITION OF THIS OBLIGATION IN TREATIES

The duty of States belonging to the comity of nations to help each other in the fulfilment of their judicial functions did not attain any degree of recognition until the nineteenth century. Since Hugo GROTIUS pronounced

himself in favour of an obligation to grant extradition, a number of authors have advocated wider general co-operation in legal matters.

No detailed historical account exists of judicial co-operation in the strict sense of the word. There are at most a few accounts of the history of judicial co-operation to be found in works on the law of extradition; see LAMMASCH: *Auslieferungspflicht und Asylrecht*, pages 1 *et seq.* and 821 *et seq.*

It was not until the second half of the nineteenth century, however, that detailed regulations on this subject were embodied in inter-State treaties. Since then, a large number of inter-State conventions have been concluded, establishing reciprocal judicial co-operation in civil and penal procedure. Co-operation has, however, in two respects advanced rather further in the field of civil procedure. On the one hand, States have concluded a large number of special conventions with a view specifically or mainly to judicial co-operation in civil actions, and on the other hand the question of civil procedure has been made the subject of a collective convention—that concluded at The Hague in 1896. As regards penal procedure, the position is quite different in both respects. As far as I am aware, there is no special convention relating exclusively to judicial co-operation in penal affairs. It is true that an administrative agreement was recently concluded on December 16th, 1925 (*Reichsgesetzblatt*, 1926, II, page 89), between Germany and Poland dealing exclusively with judicial co-operation in penal matters, but this agreement—which has not been promulgated as a law—does not prescribe the conditions of such co-operation but simply the procedure by which it is to be carried out. The relevant principles of judicial co-operation in penal matters have, however, been embodied in inter-State treaties of the most varied character, more particularly extradition treaties, conventions providing for judicial co-operation in civil and penal matters, treaties of friendship and good-neighbourliness, treaties of peace, treaties of friendship and extradition and, lastly, treaties of friendship, commerce and navigation. No multi-State convention on penal procedure has been concluded on the lines of the above-mentioned Hague Convention on civil procedure.

For the purposes of this report there is no need to consider whether we should accept the views of those authors of works on international law who claim that there already exists a general custom in international law by which every State, even when not bound by convention, is under obligation to assist any other State member of the international community in its administration of justice by assisting it in penal matters; or whether, on the other hand, we should accept the views of those who refuse to recognise the existence of any legal obligation unless formally laid down in an existing treaty.

As regards the position of this controversy in 1910, see MEILI: *Lehrbuch des internationalen Straf- und Strafprozessrechts*, page 374; see also von LISZT-FLEISCHMANN: *Völkerrecht*, page 353, who rejects in principle the obligation of judicial co-operation.

Even those authors who maintain that a custom exists in international law or those who prefer to base their arguments upon natural law do not, as a rule, go beyond laying down the principle of obligatory judicial co-operation in penal matters and leaving it to the individual States to formulate rules for the actual application of this principle. The mere acceptance of this rule by States is not a matter of great practical importance. Unless bound by a convention, States, even though they may not recognise the principle of a general and fundamental obligation, may nevertheless, in individual cases and within certain self-appointed limits, deny any obligation to render assistance in judicial matters. Where no treaty exists, then, every State has in practice the right to decide for itself how far it will recognise an international obligation to afford assistance in judicial matters. This juridical position, whereby, in the absence of a convention, each State has the sovereign right to decide for itself whether it will or will not accord its help in a specific case, is of particular importance to States which on principle refuse to conclude international treaties for judicial co-operation. It is interesting to note that certain States, though far from rejecting the principle of an obligation in international law as regards judicial co-operation, refuse on principle to conclude treaties on this subject, so that in practice they enjoy full freedom of decision as regards other States in all individual cases, despite the fact that they theoretically recognise the principle of an obligation under international law to afford their assistance to such States in judicial matters. This seems to be the attitude of the United States, for example.

Nevertheless, the practical needs of international life are leading States to afford each other assistance, even in penal matters. This fact is revealed in a large number of conventional provisions, even though, as we have already pointed out, no special convention yet exists relating exclusively to judicial co-operation in penal matters. If we study the history of conventional clauses of this kind, we find that they became more and more common during the second half of the nineteenth century. MONIER (*Les Commissions rogatoires en droit international*, Paris, 1909) states that the first provisions regarding "commissions rogatoires et remises de signification" occur in the conventions concluded by France in 1844 and 1846 with the Netherlands and the Grand-Duchy of Baden. It is possible, however, that a few conventions of this kind were concluded before 1844 between the various German States inside the German Federation. As I have already said, clauses of this nature became more and more common in conventions in subsequent decades of the nineteenth century, and deal with an ever-increasing number of special points connected with judicial co-operation in penal matters. It was not until 1869, however, that any treaties included a formal obligation in regard to the serving of writs in general, including the serving of writs upon accused persons. The first clause of this kind occurs in Article 13 of the Franco-Belgian Convention of 1869 and the Franco-Bavarian Convention, which was

based on the model of the former. The total number of conventions concluded since 1844 is, I believe, 128 (see list of these conventions in Annex II to the present report). The most recent and most detailed provisions are to be found in the following Conventions: Conventions of May 8th, 1922, between the German Reich and the Czechoslovak Republic on extradition and other forms of judicial co-operation in penal matters; Convention of July 12th, 1921, between Estonia and Latvia; Convention of April 19th, 1924, between Bulgaria and Roumania; Convention of November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria; Convention of July 12th, 1921, between Latvia and Lithuania; Convention of February 12th, 1923, between Denmark and Finland; Convention of February 28th, 1915, between Paraguay and Uruguay. Unfortunately, I have been unable to obtain copies of a number of treaties on extradition and co-operation in judicial matters which, I understand, Italy has recently concluded but has not yet ratified.

The juridical notion of obligation to afford mutual assistance in the administration of the penal law also appears in the parallel provisions of the national laws of the various States which have adopted regulations in regard to judicial co-operation. Such rules exist in the general laws on judicial organisation and administration, as well as in special laws on penal procedure. (It is a remarkable fact that Articles 914 *et seq.* of the Code of Civil Procedure of the State of New York contain provisions regarding judicial co-operation in penal matters.) Lastly, provisions of this kind are to be found in ministerial decrees and circular instructions sent to diplomatic representatives and consuls abroad.

See also the declarations regarding judicial co-operation exchanged between the Austrian Government and the Swiss Federal Council on the subject of correspondence between the Imperial and Royal Courts and Public Prosecution Offices of the kingdoms and countries of the Austro-Hungarian Monarchy represented in the Reichsrat on the one hand and the Swiss judicial authorities on the other. These declarations introduced modifications on certain very important points in the Extradition Treaty concluded on March 10th, 1896, between Austria and Switzerland. They are reproduced in *Normen über die internationalen Rechtsbeziehungen auf dem Gebiete des Zivil- und Strafrechts und über dem Rechtshilfeverkehr mit dem Auslande* (Vienna, 1910).

It is interesting to note that in negotiations for the conclusion of conventions such clauses applying to individual States have often played a part similar to that of autonomous Customs tariffs in the economic sphere; the tariffs are taken as a basis or framework for subsequent commercial agreements. A number of countries, having no legal provisions of their own on the subject, have developed a certain judicial usage. This is the case in the Anglo-Saxon countries and in Brazil.

Clearly, then, the idea of international judicial co-operation, based on rules of law, is undoubtedly making progress even in regard to penal matters. It

would therefore seem particularly desirable to give this idea practical shape by means of a multi-State convention, as has already been done in the case of judicial co-operation in civil procedure. As early as 1812, Anselm FEUERBACH, the celebrated German professor of penal law, in preparing a draft treaty on relations between the judicial administrations of two neighbouring countries (§ 103, No. 1), included in the third part of the special provisions a clause providing for mutual judicial assistance in penal matters. Although the only immediate aim was to draw up a typical inter-State convention, Feuerbach's idea nevertheless tended towards the unification of the rules of law relating to the question.

The draft is worded as follows:

"The two States agree to afford each other judicial assistance both in civil and in penal matters in so far as the present treaty contains no special restrictions in those respects."

Further, the Austrian jurist, Domin PETRUSHEVETZ, in his *Précis d'un Code de Droit international* (Leipzig, 1861), gave a number of explanations of the term "commission rogatoire," the obligation to give evidence, and the costs of judicial co-operation in penal matters. Volume 13 of the publications of the International Association of Criminalists, which aims at securing the unification of large sections of penal law, includes an article by HONORAT entitled "Etude sur les moyens de réprimer la criminalité internationale." This article contains the following observations on judicial co-operation:

"The magistrates and judicial police officials of the different countries would have to be given the right to send each other letters rogatory and communicate with each other direct without being obliged to have recourse to the diplomatic channel through various ministries, a process which always involves a considerable loss of time" (page 266, No. 3).

Lastly, MEILI, who represented Switzerland at the Hague conferences for the conclusion of the Convention on Civil Procedure, writes as follows in his *Lehrbuch des internationalen Straf- und Strafprozessrechts*:

"The best method would be to unify the main principles and apply them to a fairly large territory (as in the Hague Conventions). This method would at any rate be preferable to that of bilateral conventions."

If we wish to regulate, on a collective basis, international co-operation in penal matters on the model of the International Convention on Judicial Co-operation in Civil Procedure, the latter Convention would, notwithstanding the differences between penal and civil procedure, prove a valuable guide to us on a number of important points.

Such a collective regulation of the subject will only be possible, of course, if the inter-State treaties and the different national codes and judicial usages reveal a certain consensus of juridical opinion as regards main principles.

I will now endeavour to show whether, and if so how far, this consensus of opinion exists.

II. CASES IN WHICH JUDICIAL CO-OPERATION IS GRANTED

If we begin by turning to the individual problems connected with the question of judicial co-operation in penal matters, we may adopt the classification which the Belgian Government established when it prepared the model conventions which it concluded in the sixties of last century. This classification has been adopted in most of the conventions relating to this question. VON MARTITZ, in his comprehensive work, *Internationale Rechtshilfe in Strafsachen*, also adopted this classification as the basis of his study of the question. According to him, the subject is divided on the following lines:

- (a) Requisitions in penal cases for the hearing of witnesses residing in the State applied to, irrespective of their nationality;
- (b) Requisitions in penal cases regarding the summoning of witnesses or experts before a foreign tribunal;
- (c) Requisitions in penal cases for the sending, under promise of return, of articles believed to constitute important evidence and papers or documents held by the administration applied to;
- (d) Requisitions in penal cases regarding the official transmission (*notification, signification*) of sentences, judicial decisions, orders, decrees and instruments of all kinds relating to procedure, to persons who are under the jurisdiction of one of the two contracting States;
- (e) The reciprocal communication of penal sentences passed by the courts of one party upon a national of the other for a crime or offence of any kind, for the purpose of registration after the sentence has become *res judicata*.

The discussion of the subject in the present memorandum is based on this scheme. It should be pointed out at once, however, that in certain respects the scheme is incomplete. In the first place, the chapters arranged by von Martitz sometimes require elaboration; for example, the question of the communication of extracts from criminal records (*Strafregister*) should be included under (e). "Reciprocal communication of penal sentences." Further, certain questions which should have been allowed separate chapters do not appear in the scheme at all. Thus it omits the question—which is mainly of a technical nature—whether, and if so to what degree, judicial co-operation in penal matters should be effected through the diplomatic channel or by direct communication between the judicial authorities (either the supreme authorities or those directly concerned), or by means of a procedure whereby the diplomatic representative of the applicant State would enter into direct communication with individual persons subordinate to the judicial administration of the State applied to. The question of costs also requires consideration. Another question affecting judicial co-operation is

that of the language to be used in the various forms of application for assistance. Lastly, consideration will also have to be given to the question of the obligation of States to send each other, when required, the legal information necessary to enable international judicial assistance to be granted. If, as a result of future legal developments, international courts of law with penal powers are eventually established, there will arise the problem of the judicial assistance which the courts of individual countries should afford to such an international court. As, however, no such international penal judicature yet exists, we need not consider this question now, but will examine each of the other problems already mentioned on the basis of the scheme set forth above.

METTGENBERG rightly states ("Rechtshilfe, zwischenstaatlich, in Strafsachen," *Handwörterbuch der Rechtswissenschaft*, VON ELSTER and STIER-SOMLO, column 1299; the author has been kind enough to place the proofs of this work at my disposal) that the execution of a requisition for judicial co-operation comprises the following two stages: "First, measures taken in the home country, i.e., the wanted person is interrogated and arrested; the object sought for is seized and placed in safe custody; the witness is summoned and his evidence taken; an enquiry is instituted and the results duly recorded. Secondly, measures taken abroad: the wanted person is handed over to the foreign authorities, who are also supplied with the evidence and the record of the case. Each of these individual measures of judicial assistance presupposes a decision to grant the requisition made by the foreign authorities."

The general arguments for and against codification cannot be examined until all the individual questions raised by the problem of judicial co-operation in penal matters have been considered.

(a) *Requisitions in Penal Cases regarding the Hearing of Witnesses of any Nationality resident in the State to which the Requisition is addressed*

This is the simplest case of international co-operation in penal matters. State A desires a person residing in State B to give evidence in penal proceedings pending in State A. It is a case which is covered by all treaties on judicial co-operation in penal matters, and it is a typical instance where judicial co-operation is in principle provided for. Even the earliest treaty I have found on judicial co-operation in penal matters—that of November 7th, 1844—contains the following provision:

"When, in the hearing of a case which is of a penal but not of a political character, one of the two Governments deems it necessary to hear witnesses domiciled in other States, letters rogatory for that purpose shall be sent through the diplomatic channel."

Another formula establishing a similar obligation is to be found in the next oldest treaty—that of April 16th, 1846, between France and the Grand-Duchy of Baden. Article 4 of this treaty reads as follows:

"The two contracting Governments undertake to cause writs to be served and letters rogatory to be executed both in civil and in criminal cases, subject to any provisions to the contrary in the laws of the country."

All existing treaties recognise this obligation.

Simple treaties of this kind on judicial co-operation were signed in the second half of the past century, particularly by France. There are the treaties concluded by France with Wurtemberg (January 23rd, 1853), with Hesse (January 26th, 1853), Portugal (July 13th, 1854), Austria (November 13th, 1855), Chile (April 11th, 1860), Sweden and Norway (June 4th, 1869), the Swiss Confederation (July 9th, 1869), Bavaria (November 20th, 1869), Italy (May 12th, 1870), Belgium (August 15th, 1874), Peru (September 30th, 1874), Luxemburg (September 12th, 1875), Denmark (March 28th, 1877), Spain (December 14th, 1874). See also the special judicial co-operation clauses of the revised Rhine Navigation Act of 1869 and the Elbe Navigation Acts of 1821 and 1841. The more recent conventions which, in addition to letters rogatory for the evidence of witnesses, provide for judicial co-operation in regard to other forms of evidence are mentioned elsewhere in the present report. (See p. 11 *et seq.*)

The same principle is applied in the laws of individual countries.

Belgium.—Article 139 of the Law of 1869 on Judicial Organisation reads as follows: "Judges may also send letters rogatory to judges of other countries, but they may only execute letters rogatory from other judges if authorised by the Minister of Justice, in which case they are bound to do so." See also the following extract from the memorandum sent by M. Verdussin (Public Prosecutor of Belgium) to the Minister of Justice on October 18th, 1877: "A judge who receives letters rogatory from another country must hold, in regard to the witnesses whom he calls, all the punitive and restrictive powers which he would hold if he were executing letters rogatory issued by one of his colleagues of his own country."

Italy.—Article 854 of the Code of Civil Procedure reads as follows: "When in penal cases measures of enquiry are to be taken at the request of foreign judicial authorities, such measures shall be taken by the Court of Appeal (*Chambre d'accusation*) or by a judge delegated by that court. In such cases the witnesses may, if required, give their depositions on oath." For special provisions relating to Italian consular jurisdiction, see Article 171 of the Italian Consular Law of January 28th, 1866.

I am indebted to Professor Diena for a correction on the subject of Italian legislation. I quoted Article 854 of the Code of Civil Procedure instead of the Code of Criminal Procedure; and I quoted the Code of 1865, which is no longer in force. The Code of Criminal Procedure now in force in Italy is that which has been in operation since January 1st, 1914. The provisions of Articles 635–639 deal with questions relating to the communication of judicial and extra-judicial documents in criminal cases and letters rogatory in criminal cases.

Netherlands.—The Law of July 6th, 1896, authorises the despatch of letters rogatory to other countries whenever the evidence of witnesses

residing outside the Kingdom is required. This law also authorises Dutch consuls abroad to take the evidence of witnesses.

Great Britain and Ireland.—Decision of the Ministry of Justice of December 12th, 1900: "The authorities of Great Britain and Ireland shall afford judicial assistance in penal matters to foreign courts by taking the evidence of witnesses, but not of accused persons and not in penal cases of a political character. The hearing of the evidence of witnesses in penal cases shall have as its legal basis the Extradition Acts of 1870, 33 and 34 Vict. cap. 52, and 1873, 36 and 37 Vict. cap. 60. According to these Acts magistrates or justices of the peace are competent, on the requisition of a foreign court, to take the evidence of witnesses. The giving of false evidence is a punishable act. The giving of evidence is compulsory. In order to enable the authorities of Great Britain and Ireland to take action, the foreign tribunal must send through the diplomatic channel a requisition which must in particular mention the maximum sum to be expended in costs, and must be accompanied by an order of the court, sealed with the court's seal, indicating the nature of the case, the names and addresses of the witnesses to be heard and the general or special questions to be put to them. An English translation of the order of the court and any documents attached thereto must be provided. The court's documents must be duly authenticated, and the authentication clause must contain an affirmation that the court making the requisition is empowered to order the taking of evidence."

Turkey.—Decree of the Court of Justice, June 16th, 1847: "The service of writs and execution of other official acts shall be facilitated and simplified as far as possible."

United States of America.—There are no laws or judicial usages in the United States regarding the hearing of witnesses in penal cases pending in other countries, because the practice itself is either quite foreign to the institutions of individual States of the Union or is only admitted within certain limits for purposes of defence. In all criminal cases the American laws always specifically require that witnesses for the prosecution shall give evidence only in court and in the presence of the accused; they are allowed to do so elsewhere only in a few of the States of the Union. It is therefore questionable whether the courts in the United States would take any action to obtain the evidence of witnesses in criminal or penal cases pending before foreign tribunals. In any case, the evidence of such witnesses could be taken only in virtue of letters rogatory and not on the strength of a mere "commission," and when necessary the letters rogatory must state the exact nature of the alleged offence and what the requesting tribunal desires to prove by the evidence of the witnesses in question. Further, they must expressly state that the statement so obtained has legal validity in the country where the case is being tried. In these circumstances, it might be possible, if a satisfactory account of the case were given, to cause the competent court in the United States to order the evidence of a witness to be taken, unless, of course, the offence were of a political nature (extract from an advisory opinion given to the Imperial Austro-Hungarian Consul in New York and reproduced in *Normen über die internationalen Rechtsbeziehungen auf dem Gebiete des Zivil- und Strafrechts und über dem Rechtshilfeverkehr mit dem Auslande* (Vienna, 1910). See also Article 914 of the Code of Civil Procedure of the State of New

York. This article reads as follows:¹ "Either of the parties to an instance, process of procedure of any kind, civil or criminal, pending before a tribunal outside the State, whether in the United States or in a foreign country, may obtain, by the procedure prescribed in the above-mentioned sections, the deposition of a witness, and, together with such evidence, may obtain books which are kept in the State (of New York) but are to be used in the proceedings in the other country."

Argentine and Uruguay.—According to a report prepared in 1877 by the Austro-Hungarian Minister to the Argentine and Uruguay, the courts of those two republics only offer their assistance in judicial matters if the execution of the judicial acts in question is applied for by a requisition from the requesting court sent through the diplomatic or consular representative in the country receiving the requisition.

Austria.—Decree by the Ministry of Justice, June 16th, 1844, § 38: "The courts in the territory to which the present law is applicable shall execute requisitions for assistance received from foreign tribunals except where there exist instruments (treaties, governmental declarations, ministerial decrees) laying down provisions to the contrary."

§ 33: "In penal cases the courts shall also, on request, agree to assist the competent foreign authorities, except where special ordinances exist containing provisions to the contrary. If the court of lower instance raises objections which are recognised as valid, the Ministry of Justice shall be asked for instructions." "Papers relating to cases of high treason, lese-majesty, offences against members of the Imperial House, breaches of the peace, forgeries of public bonds and the counterfeiting of coinage may not be communicated to foreign authorities except by permission of the Minister of Justice."

Spain.—See L. GESTOSO Y ACOSTA, *Nuevo Tratado de derecho procesal, civil, mercantil*, pages 309 *et seq.* Articles 193 and 194 of the Law of Criminal Procedure prescribe as follows: Article 193: "Letters rogatory addressed to foreign courts shall be transmitted through the diplomatic channel in the form prescribed by treaty or, in the absence of a treaty, in the form prescribed by the Government. In all other cases the principle of reciprocity shall be applied." Article 194: "The rules laid down in the preceding article shall also be applicable for the purpose of giving effect in Spain to letters rogatory from foreign courts requesting the execution of a judicial act."

Sweden.—The exchange of letters rogatory provided for by extradition treaties is governed by two Laws of March 6th, 1899.

Brazil.—As regards the methods of treating and executing in Brazil letters rogatory from foreign courts, the Brazilian Law of November 20th, 1894, No. 221, on judicial organisation has changed the previously existing legal position (except in regard to requests for the execution of sentences); letters rogatory from foreign courts will now always require the exequatur of the Federal Government before they can be executed in Brazil.

The above particulars afford sufficient evidence of a widely held legal opinion that requisitions from a foreign State for the evidence of witnesses should in principle be granted by the State to which they are sent. The nationality of the witness is quite irrelevant, so that the requisition is

¹ Translation; the original is not available in the Secretariat.

granted even where it relates to a person not possessing the nationality of the State applied to, but resident in its territory and therefore subject to its authority. Further, there is no doubt that the hearing of witnesses should be carried out in accordance with the laws of the State applied to. Its legal restrictions should be observed, the procedure it prescribes should be followed and the coercive measures it allows should be used. As regards this last point, it would in any case seem possible to subpoena a witness where the evidence is taken in execution of an inter-State treaty which has become law. Objections might be raised, however, in countries where there is no legal basis for the judicial assistance. In certain instances Lammasch recommends that depositions may be made compulsory by convention even where the laws of the State applied to do not allow a subpoena. These laws do not, perhaps, allow a subpoena to be served if the witness is not connected with the State either as its national or through being domiciled there, but is a national of the State making the requisition and is only staying temporarily in the State applied to. LAMMASCH (*op. cit.*, page 864) cites the instance of a witness taking a short journey abroad and so evading the obligation to give evidence in a case in which he might criminate himself.

It is important to note that recent treaties of judicial co-operation apply to requisitions for the evidence of witnesses in penal cases the clear and simple principle that the State applied to takes such evidence *on behalf of* the State making the requisition. The favourable treatment accorded in penal cases to requisitions for the evidence of witnesses is extended to other measures of enquiry. The older treaties actually enumerate all acts of this kind for which judicial assistance should be rendered (expert opinions, constats, searching of the person, communication of commissions to obtain evidence); but the most recent treaties do not as a rule contain such lists. Thus, the Extradition Treaty concluded on April 19th, 1924, between Bulgaria and Roumania declares in Article 19:

"When either of the Governments deems it necessary to hear witnesses domiciled in the other State or to take any other measure of judicial enquiry in the prosecution of a criminal case of a non-political nature, letters rogatory shall be sent for this purpose through the diplomatic channel and shall be executed in accordance with the laws of the country in which the witnesses are to be heard or the measures of judicial enquiry taken."

This treaty shows that the principle of judicial co-operation in penal matters is extended from the hearing of witnesses and kindred measures of enquiry to the examination of the accused themselves. The Treaty concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia is even clearer on this point. Article 59 reads as follows:

"They shall in particular notify each other of measures regarding penal procedure and shall carry out measures of enquiry such as the examination of accused persons, witnesses and experts, judicial constats, searching of the person and sequestration . . . and the communication of documents and articles connected with the penal procedure."

In order to illustrate the general obligation to carry out all measures of enquiry, this article cites certain examples, notably the examination of the accused themselves. A similar clause exists in Article 14 of the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria, Article 14 of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Latvia and Lithuania (this latter employs the words "carry out any other enquiry") and Article 14 of the Treaty of Extradition concluded on November 29th, 1923, between Finland and Sweden ("to take the evidence of witnesses . . . or to carry out any other investigation"). It is instructive, too, to consult the Treaty of May 8th, 1922, between Germany and Czechoslovakia on Extradition and Other Forms of Judicial Co-operation in Criminal Cases. Article 16 reads as follows:

"Holding of enquiries: The Contracting Parties undertake at the request of the competent authorities to hold enquiries and in particular to hear accused persons, witnesses or experts and to carry out judicial inspections or examinations and sequestrations."

The use of the words "in particular" shows that the various measures of enquiry are only cited as examples, and that in principle judicial co-operation is promised for all such measures. Moreover, these texts do not stipulate that the measures of enquiry in question are confined to measures which could be accomplished only by the *judicial authorities* of the State to which the requisition is addressed. They may also include the seizure of postal correspondence, a police search for a person, or application to the civil status office (*Standesamt*) for information. This position is the outcome of a very interesting process of development. Judicial co-operation in penal cases began with the hearing of witnesses in the interest of the requesting State, and has eventually been extended to cover all measures of enquiry in penal cases generally. All these measures have to be carried out in accordance with the laws of the State to which the requisition is sent—as we saw, indeed, in regard to the hearing of witnesses. In this connection an important point is raised in Article 17 of the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between Bulgaria and the Kingdom of the Serbs, Croats and Slovenes. Under the terms of this article, the Ministries of Justice of the two contracting parties, if requested to do so, are to communicate to the competent authorities of the other State the texts of the laws in force in the jurisdiction of the State applied to. This measure is

necessitated by the diversity and complexity of the various national laws on procedure.

It is true that the obligation of the State to which the requisition is sent to carry out at the request of the applicant State measures of enquiry of any kind—which obligation we have shown to be the outcome of a process of historical development—is subject to a limitation which has not yet been considered. In certain cases the execution of requisitions of this kind may be refused not only in the case of political offences but also whenever the requisition relates to an offence which is not extraditable. This restriction is included in the most recent treaties on the subject.

See, for example, the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Estonia and Latvia. Article 16 reads: "Whenever, in a criminal case in which extradition is admissible under the terms of the present Convention, the authorities . . . ask . . . that a witness be heard. . . ." See also the corresponding clause of Article 19 of the Extradition Treaty between Bulgaria and Roumania, Article 16 of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Latvia and Lithuania, Article 16, in conjunction with Article 17 (1), of the Treaty of May 8th, 1922, between Germany and Czechoslovakia on Extradition and Other Forms of Judicial Co-operation in Penal Matters. This last article reads: "The legal assistance provided for in Articles 14 to 16 may be refused if the obligation to extradite as defined in the provisions of the present Treaty does not apply to the criminal proceedings in respect of which such legal assistance is demanded."

Moreover, the most recent treaties leave no doubt as to the intention to extend the right of refusal, within the scope indicated, to all measures of enquiry whatever, whereas the practice in previous treaties, and indeed the former theory, often limited this—exceptional—right of refusal to certain specified acts of enquiry, not including the actual hearing of witnesses.

See, for example, the Extradition Treaty concluded on May 18th/31st, 1911, between Austria-Hungary and Bulgaria, Article 16 (2) of which reads as follows: "Nevertheless, when letters rogatory are issued with a view to the searching of persons or premises or the seizure of the *corpus delicti* or of evidence of guilt, they may only be executed subject to the reservation laid down in Article 8 (3) (rights of third parties) and only with reference to one of the acts enumerated in Article 2 (list of extraditable offences)." As regards literature on this subject, see in particular VON MARTITZ (*op. cit.*, page 724): "If the object of the requisition is domiciliary visitation or sequestration, it cannot legally be executed except with reference to a crime or offence mentioned in the Extradition Law or the supplements thereto."

As already mentioned, a different view is taken in the most recent treaties, and the new theory that within the scope indicated the right of refusal extends to all measures of enquiry is also set forth in the more recent works on the subject (see MEILI, *op. cit.*, page 378). As regards the scope of this

reservatory clause, the older treaties attempted to enumerate all exceptional cases where the right to refuse any assistance existed.

See, for example, Article 20 of the Extradition Treaty of September, 29th, 1911, between Germany and Bulgaria, Article 17 of the Extradition Treaty of November 21st, 1910, between Switzerland and Greece. MEILI also adopts the method of enumeration (see *op. cit.*, page 378).

In the most recent treaties, on the other hand, the exceptions only cover offences which are not extraditable; yet a careful examination of the lists given in the older treaties shows that the offences enumerated therein really correspond to the category of extraditable offences. An attempt might be made to draft a formula of a purely general character, such as, for example, that the carrying out of measures of enquiry may be refused where it would affect national interests; but a wide formula of this kind would obviously be open to serious objections from the point of view of international legal security in this matter. Lastly, even if a general clause were drawn up to apply to non-extraditable cases, this does not necessarily mean in practice that assistance would always be refused in such cases. It simply establishes a right of refusal, and there is therefore nothing to prevent a State from still complying with a requisition and affording its assistance (as indeed certain States already do) in cases where the accused is in territory which comes under the authority of the requesting State. In certain circumstances, indeed, such action would be highly desirable—for example, where a national of the State applied to, lying under a charge in another country, could furnish proof of innocence. In negotiating a convention, therefore, the best course would be simply to take the general clause adopted in the most recent treaties and extend the scope of the right of refusal to those cases only in which extradition is not obligatory.

In connection with the question of the obligation resting upon the State applied to carry out measures of enquiry, it should further be noted that cases may exist where this obligation cannot be allowed even in the absence of the reservation referred to above (non-extraditable offences). I refer to cases where the requisition of the foreign State should be rejected on the ground of incompetence. It has already been explained that the enquiries are carried out by the State applied to subject to its own laws. But these laws also determine what authorities are competent to receive letters rogatory and carry out enquiries, and they may also require that the authority competent to carry out the enquiries shall ascertain whether the *foreign* authority from which the letters rogatory came also possesses the necessary competence. In most States the laws on civil procedure probably establish this right to verify the competence of the *requesting* authority. It is also mentioned in national laws, jurisprudence and treaties. Thus a decree of the Austrian Ministry of Justice dated June 18th, 1854, states that:

§ 38: "Judicial co-operation shall be refused if the act demanded by the requesting court does not come within the competence of the courts

as determined by the relevant internal laws. If the act requested comes within the competence of another home authority, the court applied to may forward the request to such authority."

§ 39: "... In granting judicial co-operation no derogation from the existing internal laws can be allowed unless the requisition expressly asks that a certain procedure prescribed in the law of the foreign country be followed in the accomplishment of the act in question and such procedure in question does not prove to be prohibited by any of the internal laws of the country."

§ 40: "If the court to which the requisition is sent refuses its co-operation, or if in a case of judicial co-operation differences of opinion arise between the applicant court and the court applied to in regard to the methods of rendering such assistance or in other respects, the Court of Appeal from the court applied to shall on demand by the applicant foreign court or other foreign public authority give, without preliminary oral hearing, a decision as to the validity of the grounds for refusal, or as to the other points in dispute."

Most of the treaties concluded by France with other States in regard to letters rogatory in penal matters contain the following general provisions:

"The letters rogatory shall be executed by the competent officials, due observance being paid to the laws of the country in which the witnesses are to be heard."

See also a decision of the German Reichsgericht, dated November 21st, 1912 (*Journal de Droit international privé*, 1904, page 956). Compare also the Treaty between the German Reich and the Czechoslovak Republic of May 8th, 1922, on Extradition and Other Forms of Judicial Co-operation in Penal Matters. Article 16 of this Treaty reads as follows: "The Contracting Parties undertake at the request of the competent authorities to hold enquiries. . . ." See also Article 19: "The letters rogatory (see Articles 14 to 16) shall be dealt with in the manner prescribed for judicial acts of this kind, and with the employment of the necessary coercive measures, by those authorities of the Party applied to who are competent under their national laws to carry out such official acts in criminal proceedings in their own country."

Even assuming that the right held by the authority applied to to decide as to its own competence always implies the right to ascertain whether the requesting authority also is competent, this does not mean that the judicial authority taking measures of enquiry will in all cases be required to decide first whether the requesting authority is competent to ask the other State to carry out the enquiries in question. Some countries, e.g., Brazil, in principle require the supreme judicial administrative authorities to decide this preliminary question. There are two possible solutions: Either the laws

of a country will require the supreme judicial authorities to examine only whether the requesting authority is competent, or they may also require those authorities to examine and decide whether the conditions in which the courts which are to carry out the measures of enquiry are competent have been fulfilled. In Germany, for example, all questions relating to the conditions governing the granting of judicial co-operation (*e.g.*, the competence of the requesting authority, the form of the requisition and, where necessary, the question of reciprocity) come within the competence of the supreme judicial administration, unless an actual treaty has been concluded containing clauses to the contrary. All these, however, are questions which solely concern the laws of individual nations and, like the procedure of extradition and exequaturs for the execution of the sentence of a foreign court, are treated in entirely different ways in different countries. The decisive factor is how far the courts are independent of the supreme judicial administration—in other words, how far their powers are separate. In practical co-operation in penal matters the influence of the supreme judicial administration on the procedure as a whole is particularly great in countries which are not bound by any convention, and where the assistance of tribunals and administrations is only granted on a basis of reciprocity. If a judge is not thoroughly familiar with the law of a foreign country he will often find it very difficult to decide whether the requesting authority is really competent. In cases where assistance is granted on a basis of reciprocity the supreme judicial authorities will be best able to ascertain whether this condition is fulfilled. Thus paragraph 38 (3) of the above-mentioned Austrian Ministerial Decree of June 16th, 1854, contained the following stipulation:

“Assistance may be refused if reciprocity is not granted. If the tribunal applied to is uncertain whether reciprocity is granted or not, it must apply to the Minister of Justice for a decision on the point, which shall be binding upon it.”

Taking all the above into account and assuming that a general convention on these matters were being drawn up on the model of the Hague Convention on Civil Procedure, the clause on this subject would be worded on the following lines:

“Article 1.—*Measures of enquiry.*—The Contracting Parties undertake, at the request of a competent authority, to take measures of enquiry. Such co-operation may be refused, however, if the penal proceedings for which it is to be rendered do not involve an obligation to grant extradition. Requisitions for judicial co-operation shall be executed by the authorities of the Party applied to which under its laws are competent to make such enquiries. The enquiries shall be carried out in accordance with the prescribed forms and with application of the proper coercive measures.”

(b) *Requisitions in Penal Matters regarding the Summoning of Witnesses and Experts before a Foreign Tribunal*

Treaties providing for judicial assistance in international penal cases often provide also that the State applied to shall, when requested by the foreign authority, simply serve an official summons upon witnesses or experts whose evidence the foreign tribunal wishes to hear. In point of fact, however, this official summons simply consists of the forwarding of a communication and has the effect of authenticating the act of communication. The receipt of the communication as such is not prejudicial to the witness or expert; sometimes, indeed, it has the advantage of affording a witness an opportunity of helping in an enquiry regarding an offence in which he is in some way implicated. On the other hand, the foreign tribunal is more likely to obtain the evidence of a witness or expert in this way than if it could do no more than issue a purely fictitious or public summons. It is noteworthy that the older treaties—such as, for example, the Franco-Swiss Treaty of 1803 (Article 18), the Franco-Swiss Extradition Treaty of 1828 (Article 6), the Austro-Swiss Treaty of 1828 (Article 5), and Article 28 of the Draft Treaty on Judicial Co-operation, drawn up by Feuerbach—established a direct obligation to give evidence. But in view of the very great difficulties which would be involved by a journey to the seat of the foreign court trying the case, and in view of the reluctance of modern States to compel their nationals to obey orders from foreign States, the treaties now in force, however wide the obligations they contain in regard to the affording of judicial co-operation, leave the individual when summoned entirely free to decide whether or not he will obey the summons to appear before the foreign court. The more recent treaties repeatedly stipulate that the person concerned shall decide for himself whether he will appear before the foreign court or not, and the State to which the requisition is sent only undertakes to invite the person concerned to appear if he thinks fit.

Cf. Article 15 of the Treaty on Extradition and Judicial Co-operation concluded on July 12th, 1921, between Estonia and Latvia: "When the Courts . . . demand . . . the personal attendance of a witness . . . and if the latter, after having received through that channel a summons to appear, signifies his consent to do so . . ."; the Extradition Treaty between Bulgaria and Roumania dated April 19th, 1924, Article 17: "If it is considered necessary or desirable to summon a witness in a criminal case of a non-political nature, the Government of the State . . . shall invite him to obey the summons served on him for this purpose by the authorities of the other State, but shall not be entitled to subject him to measures of coercion"; Article 61 of the Treaty on Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia: "The witnesses and experts . . . who, upon receiving a summons, appear of their own free will"; Article 15, paragraph 3, of the Treaty on Extradition and Judicial Co-operation concluded between the

Kingdom of the Serbs, Croats and Slovenes and Bulgaria on November 26th, 1923: "No witness or expert of any nationality whatsoever, who appears of his own free will before the judges of the State making application . . ."; Article 15, paragraph 2, of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, by Latvia and Lithuania: "In case of voluntary attendance . . ."; Article 15, paragraph 2, of the Treaty of May 8th, 1922, between Germany and Czechoslovakia on Extradition and Other Forms of Judicial Co-operation in Penal Matters: "A witness or expert who voluntarily appears before the authorities of the requesting Party in response to a writ of summons served upon him by the authorities of the Party to which the requisition was sent. . . ."

The requesting State cannot, on its own authority, subpoena a witness or expert having the nationality of a foreign State and residing in his country of origin, because it is an accepted principle that all powers of this kind held by any State stop at its frontiers; neither can a State, when it receives a requisition to serve a writ of summons, compel its own nationals to place themselves at the disposal of a foreign State as witnesses or experts unless its nationals have been rendered subject to this obligation by a treaty which has been given the force of law. As has already been said, however, treaties of this kind are now no longer concluded. On this point, nevertheless, LAMMASCH interprets the treaties on judicial co-operation to mean that the contracting Governments are bound to invite a witness whose personal attendance before the court of the other State is necessary to go to the seat of the requesting tribunal, and to emphasise to him that this journey is necessary in the general interests of justice (*op. cit.*, page 862). Unfortunately, he does not cite any authority for this assertion, and in my opinion no such sweeping obligation can be read into any of the more recent treaties which I have seen, although such an obligation might perhaps be desirable in the common interest of States for the purpose of the administration of justice. From the purely legal point of view, moreover, there would be no appreciable difference between the mere communication of a summons and an invitation to obey the summons, because it is obvious that the invitation cannot be accompanied by any threat of coercion; a mere formal invitation would thus have no more than a moral value. VON BAR rightly says (*Lehrbuch des Internationalen Privat- und Strafrechts*, Stuttgart, 1892, page 329):

"In order that the person cited, if mistakenly apprehensive of coercion on the part of the requesting State, may not under this mistaken impression comply with the summons of the requesting State, the correct course would be to mention *expressly* that no coercive measures will be employed either by the authorities serving the summons or by those ordering it."

Von Bar considers it particularly necessary to apply this procedure in cases where the summons of the requesting authority customarily includes

comminatory formulas. Various writers on the theory of international law have made suggestions involving the creation, on a more or less extensive scale, of power to compel experts or witnesses to appear in person before a foreign tribunal; but these proposals have not perceptibly influenced recent treaties.

See LAMMASCH, *op. cit.*, pages 862 *et seq.*: "Although it is desirable that witnesses should not be compelled to appear before the tribunals of a foreign State in cases where the States concerned are far distant from each other, or are, for example, separated by an ocean, nevertheless it is going too far, in my opinion, to exclude its application altogether in relations between adjacent States, since the public interest would be sacrificed to the individual interest; indeed, in some cases the highest conceivable form of personal interest might be sacrificed, namely, the interest of a wrongly accused person in proving his innocence.

"Until science, the electrical transmission of signs and sounds, the telegraph, the telephone, have advanced so far as to enable the competent court to hear a witness *not present*, it will, in my opinion, be necessary to adopt one of two methods of determining in this question the extent to which private interests should be protected, even to the detriment of the proper administration of justice. Either it may be agreed that witnesses are to be compelled to attend in the event of the jurisdictional districts in the two neighbouring States being adjacent, or the court which is asked to serve the summons may be left to decide in each case whether or not pressure should be brought to bear on a witness, taking account, on the one hand, of the need for his personal attendance and the importance of the case itself and, on the other, of the loss which he might sustain through prolonged absence from his domicile and the extent to which this loss would be reparable. Should the witness ultimately be compelled, the means of coercion used would obviously have to be the same as those applicable in the case of a writ served by the courts of the country itself, and he would have to be suitably indemnified."

Whatever view be taken, it would be better, in order to facilitate the conclusion of a general convention in the near future, to avoid introducing in the draft any innovations so radical as these. If the person cited by a foreign State to appear as a witness or expert happens to be in custody in the State applied to, neither the unilateral consent of the person cited nor in the modern State the unilateral consent of the authorities who are in charge of him are in themselves sufficient to give effect to the summons (see on this subject the explanation given below in another connection). The question whether the State has the right to compel its *officials* to appear before foreign tribunals and give evidence (LAMMASCH, *op. cit.*, page 866, says that the State obviously possesses this right) will depend primarily upon the State concerned.

The usual method by which the writ of summons on the witness or expert is served by the State applied to on behalf of the applicant State is as follows: An original document issued by the applicant State, which is

sent with the request for service, is handed officially to the person concerned in the State applied to by the authorities of that State. Thus, Article 17 of the Extradition Treaty of April 19th, 1924, between Bulgaria and Roumania reads as follows:

"If it is . . . necessary . . . to summon a witness . . . the Government . . . shall invite him to obey the writ of summons served on him for this purpose by the authorities of the other State . . ."

The State applied to has the right to examine the summons and ascertain whether the requesting State has included in it any comminatory formulas which are inadmissible, and in such cases the former State need not serve the summons. Further, it need not do so if the offence is not extraditable. In any case, the rules applicable to the serving of the summons will clearly be those of the State applied to, and that State will fulfil its international obligation if it serves the summons in accordance with its own law. Admitting that persons cited before foreign courts are not bound to appear, States who reciprocally agree to serve writs upon witnesses or experts will endeavour to reduce as far as possible the inconvenience of attendance in such cases by taking steps to settle the question of the expenditure which the persons in question will incur for the journey. The various conventions on this subject, however, differ from each other on points of detail.

Cf. Article 15 of the Treaty on Extradition and Judicial Co-operation concluded on July 12th, 1921, between Estonia and Latvia: "When the courts or examining magistrate of one of the Contracting Parties, in criminal cases where, under the terms of this Convention, extradition is admissible . . . demand . . . the personal attendance of a witness . . . and if the latter . . . agrees to comply with the request, the expenses incurred by him for travelling and maintenance shall at his request be reimbursed to him, in accordance with the tariffs of the requesting country, by the judicial authorities of his place of residence and at the cost of the requesting country. . . ." Extradition Treaty of April 12th, 1924, between Bulgaria and Roumania (Article 17): "The cost of the attendance of a witness shall in all cases be borne by the State making the application, and the request . . . shall show the amount allowed to the witness for travelling expenses and subsistence, together with the amount of the advance which the State to which application is made may pay to the witness subject to repayment by the State making application. This advance shall be paid as soon as the witness has declared his willingness to comply with the writ of summons." Article 61, paragraph 3, of the Treaty of Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia: "The writ of summons shall indicate the sum to be granted by way of travelling expenses and subsistence allowances. The person cited shall, if he or she desires, obtain an advance to cover travelling expenses and subsistence in the territory of the requesting State."

See also Article 15, second paragraph, of the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between

the Kingdom of the Serbs, Croats and Slovenes and Bulgaria; Article 15, first paragraph, of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Latvia and Lithuania. See also Article 22 of the Treaty of Extradition and Judicial Co-operation concluded on May 8th, 1922, between the German Reich and the Czechoslovak Republic; this Treaty contains a general clause by which the expenses caused by judicial co-operation will be chargeable to the party on whose territory the expenditure is incurred. On this point METTGENBERG, in his notable work entitled *Die Verträge mit der Tschechoslovakei über Rechtshilfe in Strafsachen* (Berlin, 1925), says: "What each party actually bears is not the cost of the judicial co-operation but only the expenditure incurred in the territory of that party for the examination of requisitions for judicial assistance." See also LAMMASCH (*op. cit.*, p. 864): "The indemnity must be sufficient to cover the expenses of the journey and return, and subsistence at the place of trial. Where the witness in question obviously cannot travel alone (*i.e.*, in the case of children, invalids and, in some cases, women), the expenses of the person accompanying the witness must also be refunded. It is most important to calculate the exact amount and to make it fully adequate when the witness has no option as to appearing or not. Nevertheless, it must not be so large as to place the witness under an obligation towards the party—plaintiff or defendant—which has him cited." The expenses of witnesses are regulated in full detail in the Supplementary Convention of July 22nd, 1868, between France and Switzerland, and the Franco-Italian Declaration of July 16th, 1873.

As a rule, however, treaties concur at least on the point that the expenses occasioned by the witness's appearance before a foreign tribunal must always be borne ultimately by the requesting State itself, whereas—as will be further discussed below—every State is accustomed to defray the costs of the acts of judicial co-operation which it carries out in its own territory. The reason for this difference is that the expenses occasioned by the hearing of a witness in a foreign country result in reality from an act of judicial co-operation. Lastly, if a witness or expert decides to appear before the judicial authority of a foreign State in virtue of a summons served upon him by the State applied to, it will still be necessary to consider his juridical status in the foreign State. Both in theory and under the treaties, there is general agreement that he cannot be prosecuted in the foreign State for offences committed before the summons was issued. The same observation applies where the requesting tribunal suspects him of being a principal offender in the case under trial, of being an accomplice, of being accessory thereto, or of having helped to promote the offence. Indeed, the observation applies even where the witness or expert is liable to arrest under a sentence pronounced before he enters the territory. Nevertheless, in international practice there is some uncertainty as to the exact scope of this safe-conduct or immunity. Some agreements clearly and definitely extend the immunity to cover all criminal acts committed before the appearance of the witness in the foreign court. Thus no penal prosecution would be allowed even for acts committed between the date of

the summons and that of the witness's appearance in court, i.e., on the journey or in the territory of the foreign State. In that case, however, the witnesses or experts would be allowed a position involving the chief consequences of diplomatic immunity. It is questionable whether such a step is really necessary, and whether the requesting State should not be allowed the right to prosecute such persons for indictable offences committed by them after they entered the territory. Expert opinion in general agrees that immunity can never be claimed if the witness or expert commits an indictable offence (such as perjury) in his evidence before the foreign judicial authority.

Cf. VON MARTITZ, *op. cit.*, p. 724: "If the party concerned obeys the summons, he shall enjoy immunity from any legal proceedings in respect of his participation in the offence in question, or any other offences committed previously. He has no immunity, therefore, if he commits perjury at the trial in question." See also TRAVERS, *International Penal Law*, p. 241. Many of the older treaties do not allow immunity to be withdrawn even in case of perjury. See Article 14 of the Spanish-Italian Treaty of 1868, and Article 9 of the Austro-Swiss Treaty of 1855; compare also LAMMASCH, *op. cit.*, p. 865.

The immunity obviously guarantees the witness or expert against other restrictions of this liberty, e.g., compulsory discovery on oath. On the other hand, the immunity of a witness or expert appearing before a foreign court is necessarily subject to a time-limit. It is universally agreed that a criminal prosecution or the execution of a previous penal sentence which has become *res judicata* is allowed, if the witness or expert prolongs his stay in the foreign country beyond the period necessary to give his evidence and return. In doubtful cases the principle adopted is that of *tempus utile* in Roman law, although in some treaties the limit is fixed even more narrowly.

Article 61, second paragraph, of the Treaty of Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia reads as follows: "Such persons may not, however, plead this privilege if they fail to leave the territory of the requesting State within 18 hours from the time when the court no longer requires their presence." Article 15, third paragraph, of the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria reads as follows: "No witness or expert . . . may be prosecuted or held in detention . . . until the expiration of 30 days from the date when his presence in the territory of the requesting State is no longer required."

Lastly, there remains the point whether and, if so, how far the State receiving the requisition may be bound to inform the requesting State whether the individual cited is willing to appear before the foreign court. In certain recent treaties a legal obligation of this kind is imposed upon the

State receiving the requisition. It is certainly a convenience for the requesting State to have a communication of this kind attached to the notice of service of the writ, which would presumably have to be given in all cases; but the value of such a communication would be small, since the person cited might change his mind at any time, and no coercive measures could be brought to bear upon him.

If a general convention on judicial co-operation in penal matters should prove to be feasible and desirable, the juridical principles considered above might be summed up as follows (an attempt has been made to provide a suitable solution for controversial points):

*"Article 2.—Summoning of witnesses and experts.—*The Contracting Parties reciprocally undertake, at the request of a competent authority, to serve writs of summons upon witnesses or experts resident in their territory, irrespective of the nationality of such witnesses or experts. A witness or expert appearing voluntarily before an authority of the requesting Party in response to a writ of summons served upon him by the authority of the Party requested shall in no case, whatever his nationality, be subject, during his presence in the territory of the requesting Party, to criminal prosecution on a charge of having been a principal, an accomplice or an accessory or of having helped to promote the act in respect of which the criminal proceedings are taken or any other act committed before he entered the territory of the requesting State. In like manner, no sentence passed upon him on account of acts committed before he entered the country may be executed on his person nor may he be arrested for any infringement of the law which took place before his journey. The special position of the witness or expert as regards the jurisdiction of the foreign State shall be forfeited if he fails to leave the territory of that State within a reasonable time after having been heard. This time-limit may be fixed for him by the tribunal making the requisition.

"The State applied to may refuse to serve a writ of summons: (a) if the offence which is the subject of the proceedings in the applicant State is not an extraditable offence in the State applied to; (b) if the person cited is threatened with coercive or other prejudicial measures in the event of his non-appearance; or (c) if the applicant State does not provide a suitable indemnity for expenses.

"The State applied to must inform the applicant State of the response which the person in question makes to the summons."

It would not seem desirable in a general convention to impose upon States to which requests are sent an additional obligation to grant to the persons summoned an advance to cover their travelling expenses to the venue of the trial, though it is true that a few recent treaties do establish an

obligation of this kind (see p. 22); but in these cases the signatory States are contiguous. Arrangements of this kind should be made by the States themselves by means of special conventions (see also below).

(c) *Requisitions in Penal Matters regarding the Communication, under Promise of their Return, of Objects which are regarded as constituting important Evidence, and of Files and Documents which are in the charge of a Public Authority*

In most treaties on judicial co-operation the assistance to be granted for the administration of justice also covers another point. Very often treaties provide that articles constituting evidence, and files and documents which are in the charge of a public authority, shall be sent to the requesting authorities of the foreign State, under promise of their return and provided there are no special objections to such action.

See, for example, Article 16 of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Latvia and Estonia: "When, in criminal cases . . . judicial authorities . . . request . . . communication of exhibits or documents, such requisition shall be complied with, provided that no serious objections exist, and that such evidence or documents will be returned." Article 18 of the Extradition Treaty of April 19th, 1924, between Bulgaria and Roumania: "When the production of exhibits or legal documents is judged necessary in a criminal case of a non-political nature . . . the requisition therefor shall be made . . . and shall be complied with unless there are special objections to this course. Such exhibits shall, however, be returned as soon as possible." Article 62 of the Treaty of Judicial Co-operation concluded on March 7th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia: "Communication of exhibits.—The authorities of the two Contracting Parties shall forward to each other, when requested to do so, articles possession of which has been obtained through the punishable offense in question or which constitute evidence; they shall be forwarded even if an order has been issued for their confiscation or destruction.

"If these exhibits are asked for in connection with the extradition, either direct or in transit, of a criminal, they must be sent whenever possible at the time when the extradition, direct or in transit, takes place. If the accused dies or escapes after his extradition has been granted, the obligation to send the exhibits is not thereby nullified. . . . The authority forwarding the exhibits may retain them provisionally if they are necessary for its own penal proceedings. The rights of third parties in regard to such exhibits shall not be affected.

"The Party sending the exhibits may stipulate that they must be returned as soon as possible. In this event, and if third parties have acquired rights over them, they must be returned without delay as soon as they are no longer required for the penal procedure in the applicant State."

Article 14 of the Treaty between Germany and Czechoslovakia on Extradition and other Forms of Judicial Co-operation in Penal Matters. "Communication of exhibits.—The Contracting Parties undertake at

the request of a competent authority to send each other exhibits or articles which the person who committed the act which is the subject of the prosecution obtained by that act, or which are liable to seizure, destruction or confiscation. . . . If the objects in question are sent upon condition of their return, they shall on request be sent back without delay. In any case, the rights of third parties shall remain unaffected." (Cf. the admirable commentary of METTGENBERG, *op. cit.*, pages 38 and 40.)

In the first place, as regards the categories of objects which are sent as evidence, it is at once obvious that the formulas used vary considerably in different treaties. All treaties, without exception, grant judicial co-operation in regard to "exhibits," *i.e.*, actual objects used as evidence. Sometimes general terms, such as "document" or "judicial instrument" are added; nevertheless, many States make a rule of never parting with the originals of documents, but send, when asked, particulars as to the contents of such documents or copies of them. But if judicial co-operation is restricted in this way—and it might perhaps seem desirable to do so in a general convention—the action taken amounts to a "measure of enquiry," and the question need not be discussed further in a chapter on the communication of exhibits. On the other hand, it would seem desirable to add to the category of "exhibits"—as in the German-Czechoslovak Treaty—the category of "objects of which the accused has obtained possession through the indictable act he has committed, or which are liable to seizure, confiscation or destruction."

The obligation to grant the temporary loan of exhibits lapses under two conditions. First, we find in this question also the characteristic clause to the effect that the penal proceedings pending before the foreign court must relate to an extraditable offence; and, in addition, Governments generally think it necessary to reserve certain discretionary powers where the loan of the exhibit would in their view be particularly prejudicial. But such prejudice cannot cover the temporary infringement of the private rights of third parties; the common interest of all States in ensuring the proper administration of justice should override interests based on private rights (*cf.* METTGENBERG, *op. cit.*, pages 39 *et seq.*). It is clear, however, that the object in view in the treaties is simply the security of the State, or rather, in a wider sense, what is known in international private law as the reservation regarding public order. Article 4 of the Hague Convention on Civil Procedure gives valuable guidance on this point.

"The execution of the writ provided for in Articles 1, 2 and 3 can only be refused if the State on whose territory it is to be executed considers it liable to prejudice its own sovereignty or security." See the interpretation of this Article by MEILI and MAMELOK on page 328 of their work entitled *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen*.

The comprehensive nature of this principle clearly proves how important it is for the interpretation of a convention of this kind to have an international court of justice which can prevent the abuse of this reservation.

Cf. the admirable explanation of this point by N. POLITIS (*The Problem of the Limitation of Sovereignty and the Theory of the Abuse of Rights in International Relations*, pages 77 *et seq.*) and LAUN (*Das freie Ermessen und seine Grenzen*, *passim*).

In this connection there is another problem that requires consideration, namely: Does the obligation resting upon the authority applied to extend only to the temporary loan of *things*, or does it cover the surrender of persons as well? The persons in question would not, of course, be persons at liberty in the State applied to; generally speaking, the latter has no right and is under no obligation to compel persons found guilty to appear before a foreign court, any more than it can compel witnesses to do so. The only point at issue is whether the State is bound to surrender, provisionally and temporarily, persons found guilty in a foreign country or witnesses in a penal case abroad, if that State happens to hold such persons (as it might have charge of things) through having them in custody. In such a case there would, of course, be no question of extradition in the true sense of the word, *i.e.*, the sending of an accused person for trial abroad, but simply the temporary surrender of a prisoner to a foreign tribunal for purposes of confrontation with some person lying under a charge in the applicant country. In point of fact, a reciprocal engagement of this kind is contained in a large number of inter-State treaties.

Cf. Franco-Austrian Treaty of November 13th, 1855 (Article 11); Franco-Bavarian Treaty of November 29th, 1869 (Article 14); Treaty between France and Hesse-Darmstadt, January 26th, 1853 (Article 12); Franco-Italian Treaty of May 12th, 1870 (Article 14); Treaty between France and Lippe-Detmold, April 11th, 1854 (Article 13); Franco-Luxemburg Treaty of September 12th, 1875 (Article 16); Franco-Portuguese Treaty of July 13th, 1854 (Article 12); Treaty between France and Saxe-Weimar, August 7th, 1858 (Article 12); Treaty between France of the one part and Sweden and Norway of the other, June 4th, 1869 (Article 11); Franco-Swiss Treaty of July 9th, 1869 (Article 15); Treaty between France and Waldeck-Pyrmont, July 10th, 1854 (Article 12). Among recent treaties see the Treaty of Extradition and Judicial Co-operation between Estonia and Latvia, July 12th, 1921 (Article 16): "When, in criminal cases . . . the judicial authorities or examining magistrates . . . ask for the surrender, for the purpose of confrontation, of an alien arrested in the territory of the other Party . . . such request shall be granted, unless any serious objection exists, but on condition that such person shall be sent back . . ."; the Treaty of Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia (Article 61, second paragraph): "If the person cited is serving a term of imprisonment in the State applied to, the temporary extradition of such person may be demanded of the supreme judicial administrative authority of that

State, provided that he is sent back at the earliest possible moment. Such a request can only be refused for major reasons, and, in particular, if the prisoner himself objects to extradition." Cf. also the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria (Article 15, 4th paragraph) and the Treaty of Extradition and Judicial Co-operation signed on July 12th, 1921, between Latvia and Lithuania; Article 16 of this last treaty reads as follows: "When, for the purpose of confrontation . . . the . . . authorities . . . request . . . the surrender of an alien arrested in the territory of the other Party, this request shall be complied with unless there is any grave objection, provided that such person . . . is duly sent back." See, lastly, Article 23 of the Extradition Treaty of September 29th, 1911, concluded between Germany and Bulgaria.

It is true that this application is contingent upon the absence of special circumstances. Unless States have settled by treaty this question of the temporary surrender of prisoners to foreign courts, and unless such treaties have been given the force of law, it would seem, as we have already said elsewhere, that according to the positive public law of most modern States the temporary surrender of a prisoner to a foreign court without his consent is a step of very doubtful legality, at any rate when the prisoner is a national of the State applied to. The question that arises is this: What are the rights of the public authorities over persons whom they hold in detention? Can they take such persons temporarily abroad without their consent? In my view they cannot. In some countries, e.g., Belgium, according to the Law of Extradition (cf. VON MARTITZ, *op. cit.*, pp. 723 *et seq.*, and TRAVERS, *op. cit.*, pp. 247 *et seq.*), the surrender of prisoners to foreign authorities is expressly forbidden. The question whether such a measure in regard to persons in detention is constitutional or not does not even arise in the case of countries which have concluded and given legal force to international treaties expressly excluding the obligation to surrender such persons. Indeed, there are a number of treaties which definitely give a negative reply to this question.

In the model conventions which the Kingdom of Belgium concluded in the second half of the nineteenth century, it is forbidden to send imprisoned persons abroad for the purpose of confrontation (cf. VON MARTITZ, *op. cit.*, p. 724).

Thus no generally accepted legal opinion exists, and it would therefore be impossible in a general convention to bind States to a juridical obligation of this kind. Since in modern legislation the policy of every country is to place foreign residents as far as possible on the same footing as nationals of the home country—except as regards political rights—no convention would be acceptable if, by prescribing an obligation to grant temporary surrender, it created a *privilegium odiosum* to the detriment of aliens.

As regards the temporary surrender of exhibits for penal proceedings

pending before a foreign court, all that should be included in a general convention would be the following provisions:

"Article 3.—*Surrender of exhibits.*—The Contracting Parties undertake, at the request of a competent authority, to hand over reciprocally to one another any articles which are in the charge of their public authorities and are believed to constitute important evidence, or of which the person who has committed the punishable offence in question has obtained possession through his act, or which are liable to seizure, destruction or confiscation.

"If surrendered subject to their being returned, such exhibits or articles shall on request be restored without delay. In all cases the rights of third parties shall remain unaffected.

"If the surrender of such articles is applied for in connection with the extradition or passage in transit of some person, they shall, whenever possible, be surrendered at the time when the extradition or passage in transit takes place.

"The requisition for assistance may be refused: (a) if the penal proceedings for which it is made do not relate to an extraditable offence, or (b) if, in view of the interests at stake, there are special reasons for not allowing the surrender of the exhibit or articles in question."

(d) *Requisitions in Penal Matters regarding the Official Communication ("Notification," "Signification") of Decrees, Judicial Decisions, Orders, Ordinances, and Instruments of Procedure of all Kinds to Persons who are Nationals of one of Two Contracting Parties*

Certain treaties render judicial co-operation obligatory not only in the cases mentioned in the previous chapter but also in regard to a number of other acts of procedure, such as the communication of sentences passed in the applicant State on persons residing in the State applied to. Judicial co-operation is sometimes granted, too, for the notification of judicial decisions, e.g., decisions fixing the amount of the expenses chargeable to the person to whom the document in question is communicated, provisional penal sentences passed with the object of concluding a penal case by summary procedure, writs of summons served upon accused persons—in short, all orders which may have to be communicated to private individuals in the course of penal proceedings.

Whenever the notification of such acts of penal procedure normally produces certain legal consequences, these consequences cannot take place in the country applied to, despite the notification of the act, since the order emanates from a public authority of another country, and is therefore necessarily inoperative. In the jurisdiction of the State applied to, therefore, the significance of the notification can only be to give information to the party

concerned, *e.g.*, it may inform him that proceedings against him have been instituted or terminated in the State making the requisition. Moreover, the serving of a notice does not involve the State receiving the requisition in any legal obligation any more than it does private individuals resident in its territory. Thus, the communication of a penal sentence passed in a foreign State could never have the legal consequences of a sentence passed by a court of the home country and having the force of *res judicata*; it could not, for example, have the effect of preventing the prosecution of the same person by the requested State if the other conditions necessary for taking proceedings were fulfilled. It has not yet been found possible to conclude in regard to civil procedure a general convention on the executory force and recognition of the validity of judgments rendered in foreign courts, and it would therefore seem still less likely that such a convention could be concluded in regard to penal procedure.

In some circumstances, however, the position is quite different from the point of view of the State making the requisition. If it has obtained judicial co-operation for the communication of its acts of penal procedure to a national of another State, it cannot be prevented from attaching to the communication of the act the legal consequences which, according to its own laws, would follow the communication of the act in question. This position may, from the legal point of view, prove highly prejudicial to subjects of foreign States. Suppose, for example, that according to the laws of the requesting State a penal judgment rendered by default becomes *res judicata* in virtue of the notification after the expiration of a certain period; the requesting State could consider the judgment of which it had given notice as *res judicata* after the expiration of that period. If the judgment ordered the confiscation of property belonging to the foreign national and situated in the territory of the requesting State, the latter might then proceed at once to confiscate the property. Indeed, if the foreign national were so rash as to enter the territory of the requesting State, that State could at once cause the penalty to be carried out on his person in virtue of the sentence, which, of course, would have become *res judicata*. In such a case a State which never surrenders its nationals for penal prosecution by a foreign court would actually, by serving the notice of the penal sentence passed by that court, have helped a foreign State to prosecute one of its own nationals. As has already been pointed out, this would only happen when the laws of the requesting State made the validity of the penal sentence contingent upon its notification to the party sentenced. LAMMASCH (*op. cit.*, page 844) rightly objects that a general obligation to grant international judicial co-operation so wide in scope as that prescribed in Article 13 of the Franco-Swiss Treaty of July 9th, 1869, and Article 14 of the Spanish Swiss Treaty, could quite conceivably admit of such consequences. These conventions stipulate that the notification of a sentence in a foreign country will produce the same effects as if notice had been served in the requesting State itself; indeed they

expressly provide for the above-mentioned consequences, which are so dangerous for nationals of the State to whom the requisition is sent. In practice, moreover, these clauses have proved difficult to apply. In one case where the Court of Belfort (France) sentenced a Swiss national to imprisonment and payment of damages, the Swiss Government notified the person concerned, in accordance with the obligation it had assumed under the Treaty, but at the same time drew up a protocol in which the person declared that he refused to receive notice of the sentence, as it had been rendered in error. The Federal Council communicated this protocol to the French Minister at Berne, intimating that the execution of the French judgment would not be recognised in Switzerland (*cf. TRAVERS: International Penal Law*, Vol. IV, pages 279 *et seq.*). But if there exists a conventional obligation to serve notice of a judgment rendered by a foreign court, and to accept without restriction the effects of such notification as laid down by the laws of the foreign country, the recipient of the notification cannot refuse to receive the document on account of the nature of its contents, nor has the State applied to the right to dispute, on account of the attitude adopted by its national, the legal effects of the notification as laid down in the laws of the requesting State. In view of undesirable consequences of this kind which follow from a general obligation to notify acts of procedure, one of the most recent treaties—the Extradition Treaty of April 19th, 1924, between Bulgaria and Roumania—contains (Article 20) the following clause:

“If one of the Contracting Parties deems it necessary to give notice of legal proceedings to a person in the territory of the other Party, the communication shall be effected through the diplomatic channel to the competent authority in the State to which application is made, which shall return through the same channel a document certifying that the notification has been made, or give the reasons preventing such notification. Sentences passed by the courts of one of the Contracting Parties on nationals of the other Party shall not, however, be notified to the latter. The State to which application is made takes no responsibility in respect of the notification of such legal proceedings.”

It is very questionable, however, whether it is sufficient to make exceptions in the case of sentences alone in order to avoid the harmful consequences which may ensue for the individual when the State to which he belongs gives an undertaking to a foreign State to notify all the latter's acts of procedure, and to agree that the latter may attach to such notification all the legal consequences involved thereby under its law. The notification of acts other than judgments might also prove prejudicial to the parties concerned. Thus the validity of the confiscation of the accused's property in the course of penal proceedings might be conditional upon notification of the judicial order to that effect. It is clearly on account of serious consequences such as

these that most treaties do not lay down any obligation to notify accused or sentenced parties of acts of procedure of any kind, *i.e.*, decrees, judgments, orders, etc. It is in the interest of the private party concerned, as well as the State applied to, to be officially informed of penal measures taken by a foreign State against such party or against one of the nationals of the State applied to. In these circumstances, States might after all be subjected, on condition of reciprocity, to an obligation to serve notices of this kind, but this obligation would have to be kept within proper limits. Besides the exceptions in regard to non-extraditable offences (which would of course apply here too) and in regard to "public order," it would have to be agreed that the requesting State may not attach to notices served by way of international judicial co-operation on a person who is charged or has been condemned the consequences to his prejudice which ordinarily would follow in its territory from the service of such notices. It seems very doubtful, however, whether States could be induced to renounce explicitly, by a clause of this kind, the legal consequences which, under their domestic laws, would normally follow from a notification of this kind.

If the juridical effects of a notification are renounced, even as regards only notifications made in a foreign country, the effect is virtually to place aliens in a more privileged position than nationals, which would be contrary to the fundamental principle that all persons are equal before the law. For this reason, it would be preferable not to include in the convention any clause regarding the official notification of decrees, judgments, orders, ordinances, or acts of procedure of any kind emanating from a foreign State.

- (e) *Reciprocal Communication, for Registration after the Sentence has become res judicata, of Sentences passed in one State upon a National of the Other for a Crime or Offence of any Kind*

Lastly, judicial co-operation may take the form of the exchange of communications relating to penal sentences. As METTGENBERG very rightly observes, this act differs from other acts of judicial co-operation in that it does not require the presentation of a requisition in each particular case, but is performed regularly and automatically. Mettgenberg makes the following observation on this point (*op. cit.*, col. 1302):

"Notification of sentences to foreign countries is not connected with any specific penal procedure, but is given solely for the information of the Government of the country of origin and for the purpose of making the necessary entries in the criminal record. The kind of sentences usually notified are those which are entered in the German criminal record. More recent conventions provide for the exchange of other information relating to the sentences notified for entry in the criminal record. Cf. Article 20 of the Treaty between Germany and Czechoslovakia on Extradition and Judicial Co-operation in Penal Matters:

“The Contracting Parties undertake to communicate to each other decisions in penal matters which have become *res judicata*, which the authorities of one Party pass upon nationals of the other Party and which, according to the laws of the country whose authorities gave the decisions, must be entered in the criminal record. The Contracting Parties will communicate to each other all information relating to decisions of this kind entered in the criminal record.

“The method of communication will be as follows: A copy of the penal decision or information to be entered in the criminal record is sent to the other Party, the exchange being effected through the Reich Minister of Justice and the Ministry of Justice at Prague.”

“The same clauses appear in the German-Polish Convention on Reciprocity, dated December 16th, 1925, which has already been mentioned on several occasions. See also Article 17 of the Convention on Judicial Co-operation, concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia, Article 21 of the Extradition Treaty of April 19th, 1924, between Bulgaria and Roumania, Article 18 of the Treaty on Extradition and Judicial Co-operation concluded on July 12th, 1921, between Estonia and Latvia, and Article 26 of the Extradition Treaty between Germany and Bulgaria, dated September 29th, 1911. According to this treaty no communications are exchanged in the case of mere contraventions.”

This last clause is interesting for the following reasons: In all the cases of judicial co-operation considered in the foregoing chapters, the authorities receiving a requisition examine the substance of the case in order to ascertain whether the crime or offence in question is extraditable or not and in the latter case judicial co-operation is refused; but information is communicated in penal cases even where the offence for which sentence was passed is not an extraditable one. Consequently, contraventions ought also to be notified, and if they never are notified it is only for purely practical reasons and because they are regarded as too unimportant. The same principle—*i.e.*, that cases are not specially examined to determine whether the offender can claim the right of asylum, but that judicial co-operation is afforded in all cases without exception—applies to cases where special information from the criminal record of the State applied to is asked for because the information supplied by the notifications normally given under the terms of a treaty is insufficient. This procedure would always be followed when a State A prosecutes a national of State B residing in the territory of B. The State in which the proceedings are being taken will not, as a rule, possess any criminal record of the person in question, since he is a national of a foreign State. Yet it might be very important for the prosecuting State to ascertain in the course of the proceedings whether the

accused had already received a penal sentence in his own country. It is quite true that the requisition for such information only represents one special instance of the measures of enquiry referred to above; nevertheless, whether the requesting State asks the other State for particulars from the Civil Register (*Standesregister*) regarding the civil status (*Personenstand*) of the accused, or whether it wishes to obtain information as to previous convictions entered in the public criminal record of the State applied to, the legality or otherwise of the act remains the same. Thus, although most treaties expressly lay down an obligation to furnish extracts from the criminal record in addition to the obligation to notify penal sentences, this stipulation is really superfluous, and is only due to the historical fact that originally the measures of enquiry for which States granted judicial co-operation were strictly limited.

In the cases examined so far, judicial co-operation has been the outcome of an undertaking given by the contracting States to communicate to each other information as to sentences passed by the courts of either State on nationals of the other State and, where necessary, to supply extracts from the criminal record of persons of their own nationality who were being tried by a court of another contracting party; nevertheless, some international conventions prescribe for specific criminal cases of international importance an obligation to notify certain criminal sentences to all the States concerned, without necessarily ascertaining whether the person sentenced belongs to the State to which the notification is sent. It was thought necessary to provide a clause of this kind in the International Convention of May 4th, 1910, regarding the suppression of obscene publications. This Convention lays down that in every State special central services are to be instituted to collect all information (including sentences, therefore), and these services are authorised to communicate with the central services of other countries with a view to the exchange of this information.

As already mentioned, certain conventions exist providing that sentences passed for contraventions will not be notified. It should be added that there are other conventions which only make notification absolutely necessary in the case of sentences by which the offender is deprived of his liberty; see Article 16 of the Treaty of Extradition and Judicial Co-operation concluded on November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria. In view of the differences existing between the penal systems and laws of the different countries, it would seem undesirable to introduce restrictions of this kind in the convention. The signatory States to a convention of this kind should make the necessary reservations themselves at the time of signing. There are, of course, certain fundamental objections to the inclusion of reservations in such a general convention; cf. Max HUBER in the *Festgabe für Otto von Gierke*, 1913; WEHBERG, "America and the Permanent Court of International Justice" in *La Revue de Droit international et de législation comparée*, 1923; RAPISARDI-MIRABELLI, *I limiti d'obbligatorietà delle norme giuridiche internazionali*, Catania, 1922.

In the light of the above, it would seem possible for States to agree to the following clause on this matter:

"Article 4.—*Communication of penal sentences and of extracts from criminal records.*—The Contracting Parties undertake to communicate to each other penal sentences which have been passed by the authorities of one of the Parties on nationals of the other and have become *res judicata*, and which, according to the regulations of the Party by whose authorities they were passed, must be entered in the criminal record.

"The Contracting Parties reciprocally undertake to execute requisitions for the communication of extracts from criminal records."

III. CHANNELS OF COMMUNICATION IN CASES OF JUDICIAL CO-OPERATION

In the previous chapters, after a few preliminary observations, we have merely examined the cases in which international judicial co-operation is granted in penal matters. We have next to consider by what means the international engagements already in force are fulfilled. In the preliminary observations it has already been said that there are three methods of affording this co-operation, which not merely exist in theory but are also adopted in practice. The first is that of the "diplomatic channel." By this term is meant the exchange of communications between one Government and another through their Ministries of Foreign Affairs and their representatives in other countries. The second method is that of the direct exchange of communications between the judicial authorities. This proceeding, which in some ways is more expeditious, can in its turn be carried out in three different ways. First, the supreme judicial administrative authority of the requesting State may negotiate direct with that of the State applied to; this method is very similar to that of the diplomatic channel. Secondly, the international action taken may emanate from the judicial authority which is dealing with the case and which requires assistance from abroad. This authority, however, does not apply direct to the judicial authority in the other country which is competent to afford the required assistance; there are certain judicial authorities which are appointed to receive letters rogatory from other countries and have to ascertain in each case whether the conditions which, under international law, govern the granting of the judicial assistance are fulfilled. This method was laid down by the often-mentioned Treaty between Germany and Czechoslovakia (Article 18 in conjunction with Article 3 of the Additional Protocol). The same stipulation also exists in the German-Polish Convention of December 16th, 1925, on Reciprocity, by which letters rogatory are to be sent to the public prosecutors of the State applied to. The third form in which the second method (direct communication between the judicial authorities) can be applied consists in allowing the judicial authority of the requesting

State not merely to act itself but to apply direct to the judicial authority of the State to which the letters rogatory are sent. This authority then has to execute the act referred to in the letters rogatory. This method is, of course, the shortest and simplest. Lastly, the countries of Anglo-Saxon law have evolved yet another method. The diplomatic representative of the requesting State acts on behalf of his Government; he applies not to the Foreign Office of the other State but direct to the party concerned, the competent judicial authorities, the advocates and notaries. Historically the diplomatic method was that originally followed, and it is still the method normally and regularly employed. As has already been observed, this method is necessarily slow and cumbersome, and burdens the services intended for the transaction of diplomatic affairs with a large number of matters of trifling importance. For these reasons, the Institute of International Law, at Zürich in 1877, recommended that questions of judicial co-operation should be settled not through the diplomatic channel but by direct communication between judicial authorities (meeting of September 18th, 1877). Nevertheless, this method is not entirely unobjectionable. As a rule, the Foreign Ministry is anxious that it alone should represent the country in all international relations, that all State "service matters" of an international character should pass through the Ministry of Foreign Affairs, or at any rate that that Ministry should decide how far another State department should act on its behalf in certain categories of international affairs. This view was clearly set forth in a circular letter issued by the French Minister for Foreign Affairs on December 19th, 1891:

"It shall be the special duty of the Minister for Foreign Affairs to determine whether relations with the foreign State making the requisition, and in particular whether the advantages of reciprocity coincide on this special point, or whether French interests in the case in question are such as to authorise derogations from the ordinary laws and the immunities which may be granted to requisitions transmitted through ambassadors."

There are indeed sound reasons in favour of this view. If the duty of executing treaties of judicial co-operation by direct communication is assigned to the judicial authorities, the latter will in that respect act as international organs; but, it is doubtful whether they possess all the qualifications necessary for that purpose, and a certain degree of control by the central authorities would seem desirable, if only to ensure that international treaties are interpreted in a uniform manner. It is interesting to note in this connection that even in international judicial co-operation in matters of civil procedure the principle of authorising direct exchanges of communications between judicial authorities has not secured universal acceptance, despite the fact that a recommendation in that sense was made at

the first Hague Conference for the Codification of International Private Law (1893).

According to the Hague Convention on Judicial Co-operation in Civil Procedure, letters rogatory are to be transmitted through the agents of the foreign services (consuls), who, at the request of the competent judicial authorities of their country of origin, communicate with the judicial authorities of the country to which they are accredited. This Convention expressly stipulates, however, that the signatory States to the Convention may also require that letters rogatory which are to be executed in their territory shall be transmitted through the diplomatic channel. At the same time, any two signatory States may, if they wish, agree to have letters rogatory transmitted direct between their respective authorities (Article 9 of the Convention on Civil Procedure). It is remarkable that a State so democratically constituted as Switzerland should insist that all requests for notification and letters rogatory should be transmitted, not through the consuls, who would ordinarily be competent, but through the diplomatic channel, except in relations with certain States where provision is made in special conventions for direct communication (cf. MEILI-MAMELOCK: *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen*, page 331).

In penal procedure considerations of public order are naturally more important than in disputes which only concern the *meum* and *tuum* of private citizens. It has not even been found possible to conclude a general convention on civil procedure providing for direct exchanges of communications between judicial authorities; it would seem entirely out of the question, therefore, to do so in a general convention on judicial co-operation in penal matters. If a general convention is to be concluded at all, it must follow precedent and stipulate that the diplomatic channel is to be used for purposes of judicial co-operation. But it might leave the individual States to conclude private agreements in regard to some or all categories of judicial co-operation, stipulating, for example, that the transmission of the communication to the authority applied to or to the party concerned shall be effected not through the diplomatic channel but through the consular representative of the requesting State. Such private agreements might equally well organize a system of direct communications either between the central judicial administrations of the two States or between the judicial authority requiring assistance from the foreign court and certain intermediary authorities of the State applied to, or, lastly, between the judicial authorities themselves. The question as to which authority would, according to the method chosen, ultimately examine the form and contents of the letters rogatory and give a decision thereon may be settled by the law of the individual countries, and need not be discussed here (as regards the German law on this subject, cf. METTGENBERG, *op. cit.*, column 1287). Here, too, it would clearly be most desirable to stipulate that decisions of individual States as to the application and interpretation of the Convention, from whatever State au-

thorities they might emanate, should be re-examinable by an international authority.

One important point which should be embodied in the general Convention itself is that private agreements may be concluded simplifying the forms of judicial co-operation in penal matters; otherwise it might be argued that the general Convention marked not an advance but a retrogression. For, although, as we have seen, the employment of the diplomatic channel is in accordance with past usage, nevertheless a number of private agreements already exist establishing a simplified procedure, at any rate in certain specified cases. In fact neighbourly relations or particularly active traffic between two States may give rise to special needs which require a simplification of the procedure of international judicial co-operation.

As regards the older treaties, see, for example, Article 12 of the Franco-Swiss Extradition Treaty of July 9th, 1869: "If in the course of penal proceedings one of the two Governments . . . considers that certain measures of enquiry are necessary, letters rogatory (a requisition) shall be sent for that purpose through the diplomatic channel. . . ." According to MEILI (*op. cit.*, page 377), the French and Swiss Governments, in order to avoid the delay caused by the employment of the diplomatic channel, have concluded a *modus vivendi* as follows: "(1) The authorities of either of the two States may apply direct for extracts from criminal records and penal sentences; (2) in urgent cases correspondence may be exchanged direct, provided that the requesting authority at once informs, in Switzerland, the Federal Department of Justice and Police, and, in France, the Ministry of Justice. But correspondence may never be exchanged direct in cases of a political character, however urgent."

Direct communication between authorities is allowed in the Convention of 1856 between Switzerland and Austria-Hungary, and Article 3 of the Italian-Swiss Protocol regarding the Execution of the Treaty of 1868. According to this latter instrument, the Italian Courts of Appeal, the Swiss Federal Court and the supreme court of every canton may correspond direct with each other in all matters relating to the transmission and execution of letters rogatory in civil and penal matters. The Settlement and Consular Treaty concluded in 1868 between Italy and Switzerland expressly mentions citations, notifications of acts, depositions or evidence of witnesses, reports of experts, papers relating to judicial interrogations and in general all documents issued in regard to civil and penal matters in the territory of either country in execution of letters rogatory issued by the judicial authorities of the other country (Article 9). By a circular letter of July 18th, 1903, from the Swiss Federal Council to the Governments of the Cantons, it was made permissible, in relations with the German Government under Articles 12 and 14 of the Extradition Treaty between Germany and Switzerland and the Convention of December 1st-10th, 1898, to transmit requests for extracts from the criminal record direct. According to MEILI (*op. cit.*), correspondence also may be exchanged direct; (1) by the Agreements between Russia and Austria, between the Courts and Public Prosecutors of Lemberg and Cracow of the one part and Warsaw of the other (this arrangement has lapsed as the result of the political events which led

to the formation of the Polish State); (2) between the judicial authorities in the jurisdiction of the Kiel Court of Appeal and the Danish authorities in urgent cases, but only in questions of fact to the exclusion of matters of principles (this arrangement also recently ceased to apply). See further Article 2, paragraph 2, of the Franco-Dutch Extradition Treaty, by which the colonial administrations of the two States may communicate direct in questions of judicial co-operation in penal matters; see also LAMMASCH (*op. cit.*, pages 867 *et seq.*), who gives the following account of the former usage in this matter: "For the transmission of letters rogatory the great majority of treaties prescribe the diplomatic channel. Nevertheless, the courts of a number of States quite often correspond direct, and this practice has not been entirely stopped despite all the ministerial orders prohibiting it. In many cases the diplomatic channel is so slow that recourse to it would be quite useless. In cases of this kind the courts are perhaps quite justified in corresponding with each other direct; and frequently they obtain the required information at once by this method. Gradually, as the restrictions to which the execution of letters rogatory is still subject in some countries are abolished and judicial co-operation becomes the rule, with only a very few exceptions, the objections to the direct exchange of correspondence between courts will disappear."

Some recent treaties, *e.g.*, the Treaty on Extradition and Co-operation concluded on July 12th, 1921, between Estonia and Latvia, prescribe the diplomatic channel as the medium for acts of judicial co-operation. The same clause exists in the Extradition Treaty of April 19th, 1924, between Bulgaria and Roumania. Article 59, paragraph 1, of the Convention on Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia, however, contains the following clause: "If required, the Contracting Parties shall afford each other judicial co-operation in criminal matters, as a rule by direct communication between the requesting judicial authorities and the judicial authorities to which the request is sent." The use of the diplomatic channel is prescribed in the Treaty of Extradition and Judicial Co-operation concluded on March 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria and the similar Treaty of July 12th, 1921, between Latvia and Lithuania. Under Article 18 of the Treaty of May 8th, 1922, between Germany and Czechoslovakia on Extradition and Other Forms of Judicial Co-operation in Penal Matters, the letters rogatory provided for in Article 14 and 16 must as a rule be transmitted direct from one authority to the other. Article 1 of the Convention on Judicial Co-operation concluded on February 28th, 1915, between Paraguay and Uruguay stipulates that letters rogatory must be sent through the diplomatic channel or through the consular representatives. The same rule is laid down in Article 17 of the Extradition Treaty of November 21st, 1910, between Switzerland and Greece.

In accordance with the above, the following article may be embodied in a general convention:

"Article 5.—*Channel through which judicial co-operation may be effected.*—Requisitions for judicial co-operation between States and the replies thereto granting the assistance required shall be sent through

the diplomatic channel, unless the States concerned have mutually concluded special agreements providing a more convenient channel of communication for such judicial co-operation."

Finally, it may be observed that simplification of the process of judicial co-operation is particularly desirable in regard to the notification of penal sentences.

IV. Costs

The question of judicial co-operation in penal matters necessarily raises another point: Who is to bear the costs of the proceedings? The most obvious solution would seem to be to charge the costs to the State on whose behalf and at whose express request assistance has been given. This indeed was the view which first prevailed, but it was soon ousted by other considerations. In judicial co-operation, as in other spheres of international life, the principle of reciprocity has come to the fore, particularly as the calculation of expenditure incurred in granting assistance in the State applied to would, in certain cases, be a complicated process costing more than the operation would be worth. METTGENBERG (*op. cit.*, column 1301) enters into an interesting discussion of this question of costs; *cf* also LAMMASCH, *op. cit.*, pages 869 *et seq.* The following treaties prove that the principle of reciprocity soon became generally adopted; the most recent conventions contain the following clauses:

See Article 17 of the Treaty of Extradition and Judicial Co-operation concluded on July 12th, 1921, between Estonia and Latvia: "The Contracting Parties mutually undertake to forego all claims for the repayment of expenditure incurred by them within their territory . . . for the examination of witnesses . . . the surrender of persons, exhibits and documents. . . ." Article 19 of the Bulgaro-Roumanian Treaty of Extradition of April 19th, 1924: "The respective Governments renounce all claims for the refund of expenditure arising from the execution of letters rogatory with the exception of sums disbursed to witnesses and experts."

Article 66 of the Treaty of Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia: "The expenditure arising from a requisition for extradition or some other request for judicial assistance in criminal matters shall be borne by the Contracting Party on whose territory the expenditure has been incurred. Expenditure arising from a request for the consultation of experts or the giving of an opinion . . . shall be repaid by the Party making the requisition." *Cf.*, lastly, the German-Czechoslovak Treaty of May 8th, 1922, on Extradition and other Forms of Judicial Co-operation: "The costs of providing legal assistance under the terms of the present Treaty shall be borne by the Party in whose territory they are incurred. The cost . . . occasioned by an advisory opinion given by experts or legal faculties shall be funded by the Party making the requisition." A similar provision is found in the German-Polish Convention on Reciprocity dated December 16th, 1925, to which we have referred on several occasions.

Now it is precisely on the necessity for a uniform settlement of this question that the publicists have laid special stress:

Cf. MEILI, op. cit., page 397: "Particular attention should be drawn to the desirability of an agreement between States concerning the costs of judicial co-operation; it is not necessary, however, that such assistance should be entirely gratuitous."

If we take, as the basis for a general convention, the policy adopted in most recent treaties, then, in the cases of international judicial co-operation which here concern us—excluding, that is to say, everything connected with extradition—we need make but one exception to the principle of reciprocal free assistance. This would be when the State applied to was asked to obtain the advisory opinion of experts.

Article 6 of a general convention might therefore be worded as follows:

"Article 6.—Costs incurred in the course of judicial co-operation.—The costs occasioned by judicial co-operation afforded under the terms of the present Convention shall be borne by the Party in whose territory the expenditure is incurred. Expenditure occasioned by request for an expert opinion shall be refunded by the Party making the requisition."

V. QUESTION OF LANGUAGE

As regards the language in which the requisition sent to the foreign State or to its authorities should be drawn up, it has now become customary in international relations for each State to use its own official language, attaching to the document a translation in the language of the country applied to, for the latter's convenience. International treaties, where they touch on this matter directly, contain in most cases only very brief provisions. They all, however, adopt the standpoint that letters rogatory should be drawn up in the official language of the State making the requisition.

Cf., as regards most recent treaties, Article 22, paragraph 2, of the Bulgaro-Roumanian Extradition Treaty, concluded on April 19th, 1924: "Letters rogatory . . . together with documents to be communicated . . . drawn up in a language other than that of the court to which the requisition is addressed, shall be accompanied, in the case of Bulgaria by a Bulgarian translation and in the case of Roumania by a Roumanian translation. . . ." Article 63 of the Treaty of Judicial Co-operation concluded on March 17th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Czechoslovakia contains, on this subject, the following provision: "Requests for judicial aid shall be drawn up in the national (official) language of the State making the requisition. . . ."

Detailed provisions concerning the question of language are only, as far as I am aware, to be found in the German-Czechoslovak Treaty of May 8th, 1922, concerning Extradition and Judicial Assistance: This Treaty contains the following final provision:

*"Article 23.—Language to be used in requisitions for judicial co-operation.—*Requisitions and documents annexed thereto shall be drawn up in the national (official) language of the applicant Party. For the purposes of the present Convention, the term 'national official language' shall be taken to mean the Czech or Slovak language on the Czechoslovak side and the official German language on the German side. Documents drawn up in the national language of the applicant Party shall, except in the case of the requisitions and communications provided for in Articles 9, 20 and 21 of the present Convention, be accompanied by an official diplomatic translation or an authenticated translation by a sworn interpreter in the national language of the Party applied to. No translation need be provided in the case of annexes to requisitions intended for a national of the applicant Party. In cases in which the claimant authorities have very great difficulty in obtaining a translation, the authorities applied to shall afford them every assistance in their power. The costs incurred in procuring the translation shall be borne by the applicant Party."

As this special provision—that no translation is required in the case of annexes intended for a national of the claimant party—is a departure from general usage, its embodiment in a general convention cannot be recommended. In the first place, any dispensation from the sending of translations complicates, both in form and in fact, the examination of the letters rogatory by the authorities of the State applied to. It is, moreover, possible that a national of the applicant party to whom an official communication is to be sent in the territory of the State applied to may be ignorant of the official language of the State which makes the requisition. On the other hand, we think it would be desirable to include in a general convention the clause of the German-Czechoslovak Treaty which, with a view to meeting any special difficulty which a State may sometimes experience in having to attach a translation to the letters rogatory, lays down that the authorities applied to shall afford the claimant State all possible assistance in obtaining a translation, subject to the repayment of the costs of such assistance.

Article 7 of the Convention might therefore be drafted as follows:

*"Article 7.—Language to be used in judicial co-operation.—*Requisitions and annexes thereto shall be drawn up in the official language of the party making the requisition.

"A translation in the official language of the party applied to, and certified to be accurate by a diplomatic representative or sworn translator, shall be attached to documents drawn up in the official language of the party making the requisition.

"Should the applicant authorities find it particularly difficult to obtain a translation, the authorities applied to shall afford them every assistance in their power. The costs incurred in obtaining the translation shall be borne by the applicant Party."

VI. OBLIGATION TO FURNISH INFORMATION ON POINTS OF LAW

It is interesting to observe that modern conventions also deal with another point:

Article 23 of the Extradition Treaty concluded on April 19th, 1924, between Bulgaria and Roumania: "The Ministry of Justice of one of the Contracting Parties shall supply the Ministry of Justice of the other Party, on request, with the text of the laws in force in its territory." Article 17 of the Treaty of Extradition and Co-operation, concluded on November 26th, 1923, between the Kingdom of the Serbs, Croats and Slovenes and Bulgaria: "The Ministry of Justice of either Contracting Party shall communicate to the authorities of the other, on request, the text of the laws in force in its territory."

We have already referred above to another case in which the State applied to, before complying with the request contained in the letters rogatory, may need to consult certain laws of the State making the requisition, particularly laws regarding criminal procedure. Such will be the case, for instance, when the competence of the State making the requisition seems to be in doubt. Several modern treaties provide for this case by laying down that the State making the requisition must provide the State applied to, on request, with the text of all laws applicable in given circumstances. It would seem to be desirable to establish the same obligation in a general convention. Naturally each State must be left to decide what authorities shall provide the foreign State with the information required; States will therefore be perfectly free to transmit such information through the diplomatic channel or through some other department—the Ministry of Justice, for instance.

Cf. paragraph 86 of the Prussian Law putting into force the Reich Law on Judicial Organisation: "The judicial administration shall be competent to provide information regarding the law applicable in Prussia." For this purpose the Administration of Justice has appointed the Ministry of Justice itself.

The Convention should therefore be completed by the following article:

"Article 8.—*Communication of information.*—The Contracting Parties undertake to provide each other, in penal cases, with information regarding the laws in force in their territory.

"They shall inform each other as to which authorities will supply this information."

VII. IS A GENERAL CONVENTION POSSIBLE?

It is clear from the foregoing pages of this report that in the matter of international judicial co-operation in penal cases there is already in existence a large body of legal principles relating to many important questions which are commonly accepted and have found expression in a large number of inter-State treaties. It would therefore seem possible to codify these principles in a collective agreement. In the general interest, moreover, such a codifi-

cation is not only possible but desirable, since international solidarity is bound to be strengthened if the present system of inter-State agreements is merged in a collective agreement which would be tantamount to the establishment of a worldwide law. The only cases not covered by this proposal would be those where inter-State treaties differ from each other so far that the common rules which could be laid down in the collective agreement would necessarily be far out-distanced by the more advanced legal principles established in the private agreements of individual countries. Here codification would, from the standpoint of positive law, simply mean retrogression.

Cf. the noteworthy exposition of this point by Charles DE VISSCHER: "La Codification du Droit International," Volume I of the *Recueil des Cours de l'Académie de Droit international*, 1925, pp. 386 *et seq.*

In the present instance, as the analysis of the individual sections of the subject shows, there is no danger in this respect. There may, however, be special objections to codification. In this connection we should first consider whether the subject of judicial co-operation within the limits contemplated is so closely linked with the law of extradition that the codification of the rules discussed here regarding judicial co-operation in penal matters should be abandoned on the ground that the Committee of Experts has pronounced itself against the codification of the law of extradition. There are good reasons for replying in the negative. Most cases of judicial co-operation in penal matters have really nothing to do with extradition. If, for example, in a penal case abroad a witness has to be heard or a citation notified in the State to which the requisition is sent, the character of such an act is entirely different from that of extradition. There is only one connection between these acts of judicial co-operation and the law of extradition, namely, that judicial co-operation within the limits specified above may be refused if the penal procedure relates to a non-extraditable offence. This is the only link between judicial co-operation and extradition; and wherever, in addition to the collective agreement, there exists a private extradition treaty between the requisitioning and the requisitioned State, this difficulty is at once solved. Only in the event of absence of legal relations in regard to extradition between two States could the reservation clause constitute an open door through which the State applied to could in the particular case escape from the co-operation promised in principle to the applicant State under the general Convention. But ought the attempt to conclude a collective agreement to be abandoned simply on account of this possibility? Moreover, even in the absence of an inter-State extradition treaty, certain legal practices and usages are observed with the object of determining which offences are not extraditable. The main difficulty here lies in the definition of a political offence—a very controversial point.

Cf. the two principal publicists who deal with this very controversial subject: LAMMASCH: *Obligatory Extradition and the Right of Asylum*, and VON MARTITZ: *International Judicial Co-operation in Penal Matters*.

If these difficulties gave rise to divergencies of view between States as regards the application of the reservation clause, there is nevertheless reason to hope that in view of the widespread tendency at the present time to submit legal questions, and particularly questions relating to the interpretation of international treaties, to an international jurisdiction States will bring their differences before an international tribunal or, in the case of a private convention, will come to an agreement as to the cases in which they will or will not grant extradition. There is reason to hope, therefore, that the difficulties raised by the reservation clause will somehow be removed, and that further progress will be achieved in the field of international law. In any case there is no reason to regard the codification in question as unrealisable simply because this reservation clause is still somewhat elastic. It is undoubtedly possible from the technical point of view to settle by means of a special convention all questions relating to judicial co-operation in penal matters without touching upon the law of extradition. But as regards judicial co-operation in the strict sense of the term, as regulated by the older treaties dealing with a wider subject—as already mentioned, most of them are extradition treaties—the question arises as to how the new rules laid down in a collective agreement will stand as regards the rules of the older treaties. The first principle which will have to be applied is: *Lex posterior derogat legi priori*. If, however, it happened that in a special agreement between two States engagements in regard to judicial co-operation had been undertaken which went beyond the obligations laid down in the collective agreement, the States in question might expressly retain these engagements by means of a reservation on a reciprocal basis, made at the time of accession to the collective agreement, or else by means of special supplementary clauses agreed upon by the parties. In this respect also, therefore, there could, in my view, be no objection to a collective agreement.

It is most important that a way should—and it naturally will—be left open for these supplementary agreements. In practice the necessity for these supplementary agreements will mainly arise between contiguous States, since their position as neighbours will render such special conventions desirable. It would conduce to the smooth working of judicial co-operation if, for example, the competent judicial authorities were allowed under these agreements to communicate with each other direct.

Cf. the examples of the practice of States cited on page 84.

The practical needs of neighbouring States have already led to the adoption of arrangements intended to facilitate judicial co-operation in penal matters; thus, for example, the forms for the communication of extracts from criminal records are sometimes worded in two languages. At the same time, it must be pointed out that certain widespread practices have arisen with the object of avoiding the necessity of applying to neighbouring States for judicial co-operation; the judicial authorities of one country use existing means of

communication to get into touch with the nationals of another country. Thus, since the Post Office, being an institution which under public law possesses certain privileges and monopolies, but fulfils its obligations by virtue of contracts of private law, carries and distributes correspondence for foreign nationals, what is there to prevent a foreign State from utilising this institution and posting to a foreign national communications of all kinds connected with penal proceedings? The foreign judicial authority may also use this channel to try to induce a national of a neighbouring State to appear as a witness in its courts or to communicate in writing information in regard to proceedings pending before it. If these measures are not official and only consist of the direct communication of information, and are free from coercion or threats of any kind, there is little to be said against them whether from the point of view of public law or of international law. Moreover, such action may sometimes be the quickest means of achieving the desired object. If, however, the judicial assistance of another State is still to be claimed, it would seem most desirable in the interests of justice that not only adjacent States but all States should conclude supplementary agreements providing a simpler and more rapid procedure for especially urgent cases of judicial co-operation.

It would seem, then, that there are no definite objections to the conclusion of an international convention on judicial co-operation, and accordingly I venture to recommend to the Committee the draft convention given in the annex hereto.

I trust that the Sub-Committee will consider the present memorandum a suitable basis of discussion. In conclusion, I desire to express my sincerest thanks to my Secretary, Dr. Paul Guggenheim, who has afforded me invaluable and zealous assistance in preparing this memorandum.

Berlin, October 12th, 1926.

(Signed) Walther SCHÜCKING,
Rapporteur.

TEXT OF THE DRAFT CONVENTION

Article 1 (pages 53-63)

MEASURES OF ENQUIRY

The Contracting Parties undertake, at the request of a competent authority, to take measures of enquiry. Such co-operation may be refused, however, if the penal proceedings for which it is to be rendered do not involve an obligation to grant extradition. Requisitions for judicial co-operation shall be executed by the authorities of the Party applied to which under its laws are competent to make such enquiries. The enquiries shall be carried out in accordance with the prescribed forms and with application of the proper coercive measures.

Article 2 (pages 64-71)

SUMMONING OF WITNESSES AND EXPERTS

The Contracting Parties reciprocally undertake, at the request of a competent authority, to serve writs of summons upon witnesses or experts resident in their territory, irrespective of the nationality of such witnesses or experts. A witness or expert appearing voluntarily before an authority of the requesting Party in response to a writ of summons served upon him by the authority of the Party requested shall in no case, whatever his nationality, be subject, during his presence in the territory of the requesting Party, to criminal prosecution on a charge of having been a principal, an accomplice or an accessory, or of having helped to promote the act in respect of which the criminal proceedings are taken or any other act committed before he entered the territory of the requesting State. In like manner, no sentence passed upon him, on account of acts committed before he entered the country, may be executed on his person, nor may he be arrested for any infringement of the law which took place before his journey. The special position of the witness or expert as regards the jurisdiction of the foreign State shall be forfeited if he fails to leave the territory of that State within a reasonable time after having been heard. This time-limit may be fixed for him by the tribunal making the requisition.

The State applied to may refuse to serve a writ of summons: (a) if the offence which is the subject of the proceedings in the applicant State is not an extraditable offence in the State applied to; (b) if the person cited is threatened with coercive or other prejudicial measures in the event of his non-appearance, or (c) if the applicant State does not provide a suitable indemnity for expenses.

The State applied to must inform the applicant State of the response which the person in question makes to the summons.

Article 3 (pages 71-75)

SURRENDER OF EXHIBITS

The Contracting Parties undertake, at the request of a competent authority, to hand over reciprocally to one another any articles which are in the charge of their public authorities and are believed to constitute important evidence or of which the person who has committed the punishable offence in question has obtained possession through his act, or which are liable to seizure, destruction or confiscation.

If the surrender of such articles is applied for in connection with the extradition or passage in transit of some person, they shall whenever possible be surrendered at the time when the extradition or passage in transit takes place.

If surrendered subject to their being returned, such exhibits or articles

shall on request be restored without delay. In all cases, the rights of third parties shall remain unaffected.

The requisition for co-operation may be refused: (a) if the penal proceedings for which it is made do not involve an obligation to grant extradition, or (b) if, having due regard to interests at stake, special reasons justify refusal to surrender the exhibits or articles in question.

Article 4 (pages 75-81)

COMMUNICATION OF PENAL SENTENCES AND OF EXTRACTS FROM CRIMINAL RECORDS

The Contracting Parties undertake to communicate to each other penal sentences which have been passed by the authorities of one of the Parties on nationals of the other and have become *res judicata*, and which, according to the regulations of the Party by whose authorities they were passed, must be entered in the Criminal Record.

The Contracting Parties reciprocally undertake to execute requisitions for the communication of extracts from Criminal Records.

Article 5 (pages 81-86)

CHANNEL THROUGH WHICH JUDICIAL CO-OPERATION MAY BE EFFECTED

Requisitions for judicial co-operation between States and the replies thereto granting the assistance required shall be sent through the diplomatic channel, unless the States concerned have mutually concluded special agreements providing a more convenient channel of communication for such judicial co-operation.

Article 6 (pages 86-87)

COSTS INCURRED IN THE COURSE OF JUDICIAL ASSISTANCE

The costs occasioned by judicial co-operation afforded under the terms of the present Convention shall be borne by the Party in whose territory the expenditure is incurred; expenditure occasioned by a request for an expert opinion shall be refunded by the Party making the requisition.

Article 7 (pages 87-88)

LANGUAGE TO BE USED IN JUDICIAL CO-OPERATION

Requisitions and annexes thereto shall be drawn up in the official language of the Party making the requisition.

A translation in the official language of the Party applied to and certified true by a diplomatic representative or sworn translator shall be attached to documents drawn up in the official language of the Party making the requisition.

Should the applicant authorities find it particularly difficult to obtain a translation, the authorities applied to shall afford them every assistance in

their power. The costs incurred in obtaining the translation shall be borne by the applicant Party.

Article 8 (page 89)

COMMUNICATION OF INFORMATION

The Contracting Parties undertake to provide each other, in penal cases, with information regarding the laws in force in their territory. They shall inform each other as to which authorities will supply this information.

TEXT OF THE DRAFT CONVENTION AMENDED AS THE RESULT OF DISCUSSION BY THE COMMITTEE

Article 1

MEASURES OF ENQUIRY

The Contracting Parties undertake, at the request of an authority competent according to the law of that authority, to take measures of enquiry. Such co-operation may be refused if the State applied to considers it prejudicial to its sovereignty or security or if the act furnishing the occasion for the co-operation is regarded by the State applied to as a political offence. Requisitions for judicial co-operation shall be executed by the authorities of the Party applied to which under its laws are competent to make such enquiries. The enquiries shall be carried out in accordance with the forms prescribed by the law of the country and with application of the proper coercive measures.

Article 2

SUMMONING OF WITNESSES AND EXPERTS

The Contracting Parties reciprocally undertake, at the request of a competent authority, to serve writs of summons upon witnesses or experts resident in their territory, irrespective of the nationality of such witnesses or experts. A witness or expert appearing voluntarily before an authority of the requesting Party in response to a writ of summons served upon him by the authority of the Party requested shall in no case, whatever his nationality, be subject, during his presence in the territory of the requesting Party, to criminal prosecution on a charge of having been a principal, an accomplice or an accessory, or of having helped to promote the act in respect of which the criminal proceedings are taken or any other act committed before he entered the territory of the requesting State. In like manner, no sentence passed upon him, on account of acts committed before he entered the country, may be executed on his person, nor may he be arrested for any infringement of the law which took place before his journey.

Each Contracting State may declare that, subject to reciprocity, it will grant the temporary surrender of persons in custody who are required to appear before the Court of the State making the requisition. Such requisition may not be refused if the applicant State undertakes to return the person

in question as soon as possible and the person raises no express objection to appearing.

The special position of the witness or expert as regards the jurisdiction of the foreign State shall be forfeited if he fails to leave the territory of that State within a reasonable time after having been heard. This time limit shall be fixed for him by the tribunal making the requisition.

The State applied to may refuse to serve a writ of summons: (a) if the offence is a political offence; (b) if the person cited is threatened with coercive or other prejudicial measures in the event of his non-appearance; (c) if the applicant State does not provide a suitable indemnity for expenses; (d) if the State applied to considers that the summons is prejudicial to its sovereignty or security; (e) if the person cited is not regarded by the law of the State applied to as a competent witness or as a witness who may be compelled to give evidence in the matter at issue.

The State applied to must inform the applicant State of the response which the person in question makes to the summons.

Article 3

SURRENDER OF EXHIBITS

The Contracting Parties undertake, at the request of a competent authority, to hand over reciprocally to one another any articles which are in the charge of their public authorities and are believed to constitute important evidence or of which the person who has committed the punishable offence in question has obtained possession through his act, or which are liable to seizure, destruction or confiscation.

If the surrender of such articles is applied for in connection with the extradition or passage in transit of some person, they shall whenever possible be surrendered at the time when the extradition or passage in transit takes place.

If surrendered subject to their being returned, such exhibits or articles shall on request be restored without delay. In all cases, the rights of third parties shall remain unaffected.

The requisition for co-operation may be refused: (a) if the State applied to considers it prejudicial to its sovereignty or security or if the act furnishing the occasion for the co-operation is regarded by the State applied to as a political offence; (b) if, having due regard to the interests at stake, special reasons justify refusal to surrender the exhibits or articles in question.

Article 4 (deleted)

Article 5

CHANNEL THROUGH WHICH JUDICIAL CO-OPERATION MAY BE EFFECTED

Requisitions for judicial co-operation between States and the replies thereto granting the assistance required shall be sent through the diplomatic

channel, unless the States concerned have mutually concluded special agreements providing a more convenient channel of communication for such judicial co-operation.

Article 6

COSTS INCURRED IN THE COURSE OF JUDICIAL ASSISTANCE

The costs occasioned by judicial co-operation afforded under the terms of the present Convention shall be borne by the Party in whose territory the expenditure is incurred; expenditure occasioned by a request for an expert opinion shall be refunded by the Party making the requisition.

Article 7

LANGUAGE TO BE USED IN JUDICIAL CO-OPERATION

Requisitions and annexes thereto shall be drawn up in the official language of the Party making the requisition.

A translation in the official language of the Party applied to and certified true by a diplomatic or consular representative or sworn translator shall be attached to documents drawn up in the official language of the Party making the requisition.

Should the applicant authorities find it particularly difficult to obtain a translation, the authorities applied to shall afford them every assistance in their power. The costs incurred in obtaining the translation shall be borne by the applicant Party.

Article 8

COMMUNICATION OF INFORMATION

The Contracting Parties undertake to provide each other, in penal cases, with information regarding the laws in force in their territory. They shall inform each other as to which authorities will supply this information.

LIST OF THE MOST RECENT TREATIES

The present Annex contains a list of treaties on judicial co-operation concluded since 1844, but the list is not exhaustive. It begins with the treaties given in the tables of contents of the various volumes of de Martens' *Recueil*, starting from volume 12 of the second series. In addition to the treaties enumerated in the second and third series (the latter is published by H. Triepel) of de Martens' *Recueil*, all treaties on the subject given in the League of Nations *Treaties Series* have been included.

The treaties concluded before 1844 which have been used in preparing the present work have been taken from the technical literature of the subject.

Nouveau Recueil général des Traités de DE MARTENS

SECOND SERIES

Vol. 12. Argentine-Paraguay, Extradition Convention, March 6th, 1877, Articles 15-18, pp. 460 *et seq.*

- Vol. 12. Argentine-Portugal, Extradition Convention, December 24th, 1878, Articles 16-17, pp. 460 *et seq.*
 Argentine-Spain, Extradition Treaty, May 7th, 1881, Article 15, pp. 486 *et seq.*
 Austria-Hungary-Monaco, Extradition Treaty, February 22nd, 1886, Articles 13-17, pp. 509 *et seq.*
 Great Britain-Uruguay, Extradition Treaty, March 26th, 1886, Article 18, pp. 744 *et seq.*
- Vol. 13. Great Britain-Guatemala, Extradition Treaty, July 24th, 1885, Article 12, pp. 492 *et seq.*
 Great Britain-Russia, Extradition Treaty, November 24th, 1886, Article 17, pp. 525 *et seq.*
- Vol. 14. Portugal-Uruguay, Extradition Convention, September 27th, 1878, Article 16, pp. 4 *et seq.*
 Roumania-Monaco, Extradition Convention, December 29th (N.S.), 17th (O.S.), 1881, Articles 13-16, pp. 117 *et seq.*
 Russia-Portugal, Extradition Convention, April 28th (O.S.), May 10th (N.S.), 1887, Articles 12-13, 15-16, pp. 175 *et seq.*
 Salvador-Costa Rica, Extradition Treaty of Peace and Friendship, October 8th, 1882, Article 34, pp. 239 *et seq.*
 Salvador-Spain, Extradition Convention, November 23rd, 1884, Article 19, pp. 255 *et seq.*
 Switzerland-Monaco, Extradition Convention, December 10th, 1885, Articles 14-17, pp. 312 *et seq.*
 Switzerland-Serbia, Extradition Convention, November 28th, 1887, Articles 14-18, pp. 387 *et seq.*
 Uruguay-Brazil, Extradition Treaty, November 25th, 1887, Articles 11-16, pp. 444 *et seq.*
 Uruguay-Spain, Extradition Treaty, November 23rd, 1885, Articles 14-15, pp. 456 *et seq.*
- Vol. 15. Belgium-Argentine, Extradition Convention, August 12th, 1880, Articles 14-15, pp. 736 *et seq.*
 Bolivia-Venezuela, Extradition Treaty, September 21st, 1883, Article 17, pp. 1775 *et seq.*
 Denmark-Spain, Extradition Treaty, October 12th, 1898, Articles 12-14, pp. 792 *et seq.*
- Vol. 16. Belgium-Netherlands, Extradition Convention, May 31st, 1898, Articles 11-13, 15, pp. 546 *et seq.*
 Congo-Portugal, Extradition Convention, August 27th, 1888, Article 11, pp. 594 *et seq.*
- Vol. 17. Germany-Independent State of the Congo, Extradition Treaty, July 25th, 1890, Articles 13-17, pp. 39 *et seq.*
- Vol. 18. Great Britain-Orange Free State, Extradition Convention, June 20th, 1890, Article 12, pp. 161 *et seq.*

- Vol. 18. Luxemburg-Russia, Extradition Convention, March 19th (o.s.), 31st (n.s.), 1892, Articles 14-17, pp. 607 *et seq.*
Great Britain-Monaco, Extradition Treaty, December 17th, 1891, Articles 18-19, pp. 646 *et seq.*
Italy-Bolivia, Treaty of Friendship and Extradition, October 18th, 1890, Article 29, pp. 728 *et seq.*
Portugal-Congo, Extradition Convention, April 27th, 1888, Article 11, pp. 803 *et seq.*
- Vol. 20. Great Britain-Argentina, Extradition Treaty, May 22nd, 1889, Article 12, pp. 193 *et seq.*
- Vol. 21. Netherlands-Russia, Extradition Convention, October 23rd (o.s.), November 4th (n.s.), 1893, Articles 11-13, 15, pp. 3 *et seq.*
Denmark-Netherlands, Extradition Convention, January 8th, 1894, Articles 11-13, 15, pp. 701 *et seq.*
Spain-Netherlands, Extradition Convention, October 29th, 1894, Articles 11-13, 15, pp. 707 *et seq.*
- Vol. 22. Montenegro-Italy, Extradition Convention, August 29th, 1892, Articles 14-17, pp. 302 *et seq.*
Netherlands-Luxemburg, Extradition Convention, March 10th, 1893, Articles 11-13, pp. 387 *et seq.*
Netherlands-Denmark, Extradition Convention, January 18th, 1894, Articles 11-13, 15, pp. 538 *et seq.*
Netherlands-Portugal, Extradition Convention, May 19th, 1894, Articles 11-13, 15, pp. 568 *et seq.*
Netherlands-Roumania, Extradition Convention, October 9th, 1894, Articles 11-13, 15, pp. 619 *et seq.*
Belgium-Orange Free State, Extradition Convention, November 27th, 1894, Articles 10-14, pp. 627 *et seq.*
- Vol. 23. Netherlands-Liberia, Extradition Convention, February 2nd, 1895, Articles 12-13, pp. 16 *et seq.*
Netherlands-Sweden, Extradition Treaty, June 26th, 1895, Articles 12-14, pp. 105 *et seq.*
Belgium-Serbia, Extradition Convention, January 4th, 1896 (n.s.), December 23rd (o.s.), 1895, Articles 13-16, pp. 195 *et seq.*
Switzerland-Austria-Hungary, Extradition Treaty, March 10th, 1896, Articles 18-23, pp. 244 *et seq.*
France-Italy-Tunis, Extradition Convention, September 28th, 1896, Articles 13-14, 16-17, pp. 375 *et seq.*
Germany-Netherlands, Extradition Treaty, December 31st, 1896, Articles 12-14, pp. 423 *et seq.*
- Vol. 24. Belgium-Peru, Extradition Treaty, November 29th, 1888, Articles 14-16, p. 9 *et seq.*
Luxemburg-Russia, Extradition Convention, March 31st (n.s.), 19th (o.s.), 1892, Article 16, pp. 145 *et seq.*

- Vol. 24. Netherlands-Serbia, Extradition Treaty, February 28th (o.s.), March 11th (n.s.), 1896, Articles 11-13, pp. 636 *et seq.*
- Vol. 25. Austria-Hungary-Uruguay, Extradition Treaty, June 25th, 1887, Article 15, pp. 51 *et seq.*
- Vol. 27. Spain-Colombia, Extradition Convention, July 23rd, 1892, Articles 17-18, pp. 171 *et seq.*
 Orange Free State-British Bechuanaland, Extradition Convention, August 30th, 1892, Article 12, pp. 183 *et seq.*
 Netherlands-Orange Free State, Extradition Convention, April 24th, 1893, Articles 11-13, pp. 207 *et seq.*
 Brazil-Netherlands, Extradition Treaty, December 21st, 1895, Articles 12-14, pp. 417 *et seq.*
- Vol. 28. Italy-Bolivia, Treaty of Friendship and Extradition, October 18th, 1890, Articles 30-31, pp. 7 *et seq.*
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 Switzerland-Netherlands, Extradition Treaty, March 31st, 1898, Articles 12-14, 16, pp. 153 *et seq.*
 Great Britain-San Marino, October 16th, 1899, Article 18, pp. 426 *et seq.*
 Belgium-Honduras, Extradition Treaty, April 19th, 1900, Articles 12-13, pp. 521 *et seq.*
 Spain-Peru, Extradition Treaty, July 23rd, 1898, Articles 13-15, pp. 574 *et seq.*
 Italy-Mexico, Extradition Treaty, May 22nd, 1899, Articles 14-19, pp. 392 *et seq.*
- Vol. 30. Great Britain-San Marino, Extradition Treaty, October 16th, 1899, Article 18, pp. 273 *et seq.*
 Austria-Roumania, Extradition Convention, June 27th (n.s.), 14th (o.s.), 1901, Articles 14-20, pp. 567 *et seq.*
- Vol. 31. Belgium-Chile, Extradition Convention, May 29th, 1899, Article 15, pp. 11 *et seq.*
 Belgium-Costa Rica, Extradition Convention, April 25th, 1902, Articles 13-14.
 Netherlands-San Marino, Extradition Convention, November 7th, 1902, Articles 11, 13, 15, pp. 428 *et seq.*
 Belgium-San Marino, Extradition Convention, June 15th, 1903, Articles 15-18, pp. 565 *et seq.*
- Vol. 33. Cuba-Belgium, Extradition Treaty, October 29th, 1904, Articles 13-14, pp. 17 *et seq.*
 Spain-Congo, Extradition Convention, July 30th, 1895, Articles 17-20, pp. 36 *et seq.*

- Vol. 33. France-Netherlands, Extradition Convention, December 24th, 1895, Articles 12-13, pp. 41 *et seq.*
 Italy-Argentine Republic, Extradition Treaty, June 16th, 1886, Articles 13-15, 21, pp. 47 *et seq.*
 Austria-Hungary-Uruguay, Extradition Treaty, June 25th, 1887, Article 15, pp. 53 *et seq.*
 Spain-Venezuela, Extradition Treaty, January 22nd, 1894, Article 19, pp. 58 *et seq.*
 Italy-Republic of San Marino, Extradition Convention, June 28th, 1897, Articles 22-24, pp. 67 *et seq.*
 France-Liberia, Extradition Treaty, July 5th, 1897, Article 12, pp. 76 *et seq.*
 Mexico-Guatemala, Extradition Treaty, May 19th, 1894, Articles 14-17, pp. 567 *et seq.*
 Netherlands-Argentine, Extradition Convention, September 7th, 1893, Articles 15-17, pp. 635 *et seq.*
 Peru-Spain, Extradition Treaty, July 23rd, 1898, Articles 14-15, pp. 92 *et seq.*
 Congo-France, Extradition Treaty, November 18th, 1899, Articles 14-18, pp. 105 *et seq.*
 Greece-Belgium, Extradition Treaty, July 9th (n.s.), June 26th (o.s.), 1901, Articles 15-18, pp. 115 *et seq.*
- Vol. 34. Netherlands-Greece, Extradition Treaty, August 12th (o.s.), 26th (n.s.), 1905, Articles 15-19, pp. 693 *et seq.*
 Belgium-Montenegro, Extradition Convention, December 8th, 1905, Articles 14-17, pp. 371 *et seq.*
- Vol. 35. Switzerland-Paraguay, Extradition Treaty, June 30th, 1906, Articles 16-21, pp. 381 *et seq.*
 Cuba-Dominican Republic, Extradition Treaty, June 2nd, 1905, Article 14, pp. 385 *et seq.*
 Spain-Cuba, Extradition Treaty, October 26th, 1905, Article 14, pp. 407 *et seq.*

THIRD SERIES

- Vol. 1. Belgium-Paraguay, Extradition Convention, November 5th, 1904, Articles 13-14, pp. 214 *et seq.*
 France-Greece, Extradition Convention, April 11th (n.s.), March 29th (o.s.), 1906, Articles 15-18, pp. 343 *et seq.*
 Greece-Austria-Hungary, Extradition Treaty, December 8th (o.s.), 21st (n.s.), 1904, Articles 15-18, pp. 219 *et seq.*
- Vol. 2. Denmark-Monaco, Extradition Convention, December 7th, 1905, Articles 11-14, 16, pp. 294 *et seq.*
 Denmark-Russia, Extradition Convention, October 2nd, 1866, Articles 7-10, pp. 772 *et seq.*

- Vol. 2. Italy-San Marino, Convention of Friendship and Good Relations, June 28th, 1897, Articles 22-24, pp. 794 *et seq.*
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Belgium-Bulgaria, Extradition Convention, March 15th (o.s.), 28th (n.s.), 1908, Articles 12-15, pp. 782 *et seq.*
- Vol. 4. Greece-Spain, Extradition Treaty, May 7th (o.s.), 20th (n.s.), 1910, Articles 11, 16-18, pp. 143 *et seq.*
- Vol. 5. Switzerland-Greece, Extradition Treaty, November 21st, 1910, Articles 17-20, pp. 696 *et seq.*
Colombia-Ecuador, Treaty of Friendship, Commerce and Navigation, August, 10th, 1905, Article 2, pp. 856 *et seq.*
Italy-Paraguay, Extradition Convention, September 30th, 1907, Article 16, p. 207.
Sweden-Norway-France, Extradition Convention, June 4th, 1869, Article 11, pp. 687 *et seq.*
- Vol. 6. Mexico-Salvador, Extradition Treaty, January 22nd, 1912, Articles 14-19, pp. 456 *et seq.*
German Reich-Luxemburg, Additional Treaty, May 6th, 1912 (Article 4, p. 463), to Extradition Treaty concluded March 9th, 1876.
- Vol. 7. Austria-Hungary-Serbia, Extradition Convention, March 30th (n.s.), 17th (o.s.), 1911, Articles 16-21, pp. 112 *et seq.*
Cuba-Venezuela, Extradition Convention, July 14th, 1910, Article 17, p. 357.
- Vol. 8. Austria-Hungary-Bulgaria, Extradition Convention, May 31st (n.s.), 18th (o.s.), 1911, Articles 14-20, pp. 575 *et seq.*
Belgium-Colombia, Extradition Convention, August 21st, 1912, Articles 13-14, pp. 728 *et seq.*
- Vol. 9. Bulgaria-Germany, Extradition Treaty, September 29th, 1911, Articles 19-26, pp. 237 *et seq.*
Germany-Paraguay, Extradition Treaty, November 26th, 1909, Articles 12-13, 17, pp. 388 *et seq.*
Germany-Ottoman Empire, Extradition Treaty, January 11th, 1917, Article 19, pp. 717 *et seq.*
- Vol. 12. Germany-Netherlands, Exchange of Notes concerning the Transmission of Letters Rogatory in Penal Matters, June 4th, 1915, p. 261.

League of Nations Treaty Series

- Vol. 2. No. 54. Greece and Germany. Extradition Treaty, February 27th (o.s.), March 12th (n.s.), 1907, Articles 16-19.
- Vol. 15. No. 393. Paraguay-Uruguay. Convention for the Purpose of Simplifying and Facilitating Procedure by Way of Letters Rogatory, February 28th, 1915, Articles 1-3.

- Vol. 18. No. 452. Denmark-Finland. Extradition Convention, February 12th, 1923, Articles 15-18.
- Vol. 23. No. 589. German Reich-Czechoslovak Republic. Convention concerning Extradition and Other Legal Assistance in Criminal Cases, May 8th, 1922, Articles 14-23.
- No. 575. Finland-Sweden. Extradition Convention, November 29th, 1923, Articles 14 *et seq.*
- Vol. 25. No. 620. Latvia-Lithuania. Convention relating to Extradition and Legal Assistance, July 12th, 1921, Articles 14 *et seq.*
- Vol. 26. No. 643. Kingdom of the Serbs, Croats and Slovenes-Bulgaria. Convention relating to Extradition of Malefactors and to Legal Assistance in Criminal Proceedings. November 26th, 1923, Articles 14 *et seq.*
- Vol. 30. No. 768. Kingdom of the Serbs, Croats and Slovenes-Czechoslovak Republic. Convention concerning the Regulation of Legal Relations, March 17th, 1923, Chapter 15, Articles 59 *et seq.*
- Vol. 33. No. 846. Bulgaria-Roumania. Extradition Convention, April 19th, 1924, Articles 17-22.
- Vol. 34. No. 867. Italy-Czechoslovak Republic. Extradition Convention, March 1st, 1924, Articles 12 *et seq.*
- Vol. 36. No. 924. Latvia-Norway. Treaty of Commerce and Navigation, August 14th, 1924, Article 26.
- Vol. 37. No. 964. Estonia-Latvia. Convention relating to Extradition and to Legal Assistance, July 12th, 1921, Articles 14-19.

ADDENDUM

M. Rundstein kindly informs me that the following treaties concerning judicial assistance, of the existence of which I was unfortunately unaware when I drew up my report, have recently been concluded:

(1) Treaty concerning Judicial Assistance between Poland and Czechoslovakia, dated March 6th, 1925 (Articles 32-59 and §§ 5-8 relate to penal cases). The Polish and Czechoslovak languages are authentic. The text is reproduced in the *Legal Gazette of the Polish Republic*, 1926, No. 14/80.

(2) Treaty concerning Judicial Assistance between Poland and Austria, dated March 19th, 1924 (Articles 55-81 relate to penal cases). The Polish and German languages are authentic. The text is reproduced in the *Legal Gazette of the Polish Republic*, 1926, No. 84/467.

(3) Convention concerning Extradition and Judicial Assistance in Penal Cases between Czechoslovakia and Roumania, with Additional Protocol, dated May 7th, 1926. The French is authentic. The text is reproduced in the *Legal Gazette of the Czechoslovak Republic*, 1925, c. 172, pages 711-720.

February 14th, 1927.

(Signed) SCHÜCKING.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 9.

Adopted by the Committee at its Third Session, held March-April 1927

LEGAL POSITION AND FUNCTIONS OF CONSULS *

The Committee has the following terms of reference:

(1) To prepare a provisional list of the subjects on international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion to examine the replies received; and

(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the question of the Legal Position of Consuls.

The Committee reached this decision on the basis of a report submitted to it by a Sub-Committee consisting of M. GUERRERO, Rapporteur, and M. MASTNY. This report was fully discussed by the Committee and, as a result of the discussion, the conclusions were modified in certain respects in order to bring out more clearly those questions for which it is hoped a solution may be found.

The particular questions falling within the general subject of the legal position of consuls which the Committee thinks might advantageously be dealt with in a general convention are indicated in the report and in the modified conclusions, which contain a statement of principles to be applied and of the solutions of particular questions which follow from these principles.

The Committee has the honour to request the various Governments to inform it whether they consider that these questions, or some of them, could advantageously be examined at the present moment with a view to the conclusion of a general convention, which, if necessary, could be completed by particular agreements between groups or pairs of States.

It is understood that, in submitting this question to the Governments, the Committee does not pronounce either for or against the general principles set out in the report and the observations or the opinions expressed therein on the basis of those principles. At the present stage of its work, the sole, or at least the principal, task of the Committee is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

* Publications of the League of Nations. V. Legal. 1927. V. 7.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before December 31st, 1927.

The Sub-Committee's report, together with the modified conclusions, is annexed to this communication.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: M. GUERRERO.

Member: M. MASTNY.

"Is it possible to establish by way of a general convention provisions as to the legal position and the functions of consuls, and, if so, to what extent?"

[Translation.]

The institution of consulates, which is much older than that of embassies, has passed through various phases in the course of its history. Its original aim, however—the protection of nationals in a foreign country—has never changed.

In Egypt, so far back as 726 B.C., the Greeks enjoyed the right of appointing magistrates to judge between them in accordance with their own laws.

At about the same time, there existed in certain parts of India special judges for foreigners; it was also the duty of these judges to watch over the foreigners' interests.

In Greece, there were the *proxenoi*, who existed as early as the sixth century before Christ. The *proxenoi* possessed attributes and prerogatives which were practically the same as those possessed by consuls in countries where there is a system of capitulations. They entertained foreigners and decided disputes between foreign merchants. They enjoyed inviolability, exemption from taxation, and were given the rights of a citizen in the town they represented.

There is, however, one essential difference between the modern consul and the *proxenos*; the latter continued to be a private individual and was not regarded as holding public office, except in the case of the *proxenoi* magistrates at Sparta.

In Rome, also, foreigners were subject to a special jurisdiction. In early times it consisted in the institution of patron and client; later, it was the jurisdiction of the *pratores peregrini*; but when the latter were first created the *proxenoi* had long been in existence in Greece; indeed, the *pratores peregrini* were only appointed when Rome began to be invaded by foreigners.

It was in the Middle Ages, owing to the development of international

trade between the West and the East, that the institution of consuls assumed its present form. The Italian Republics were the first to establish consuls, and shortly afterwards the southern cities of France followed their example.

The legal status of these consuls was, in almost every instance, settled by treaty. In Moslem lands, consuls were invested with wide powers and numerous functions. They enjoyed the same prerogatives as ambassadors: extra-territoriality; exemption from taxes and tribute; immunity, both civil and criminal; the right of asylum; the right to conduct religious services in the consulates, etc.

We do not propose to consider here the case of consuls in countries where there is a system of capitulations. This system, moreover, may already be regarded as little more than an historical memory.

The question to be examined is that of the legal position of consuls.

At first sight, this question would seem to be of minor importance from the international point of view; but in past centuries it has formed the subject of controversy, and at the present time it is still often discussed. It is always a matter of stronger States claiming, on behalf of their consuls, privileges which they themselves refuse to grant to the consuls of smaller States. Not so very long ago a great Power arrogated to itself the right to force the Government of a small State to cancel a decree revoking the *exequatur* granted to a consul who had become involved in a conspiracy. Even between two great Powers conflicts regarding the legal position of consuls may occasionally arise. France and England have experienced difficulty in connection with the arrest of a British consul at Papaëte. Disputes, less serious indeed but always unpleasant in international relations, often occur in all countries.

Consequently, a collective agreement regarding the legal position of consuls would indubitably be of considerable help in promoting those good relations which should exist between States.

The question we first have to consider is whether the consul is or is not a "public minister."

The answer to this question is the point on which all the rights and prerogatives of consuls depend, and it is undoubtedly in the negative. In giving this opinion, we are merely endorsing a standpoint which has long been that of the chancelleries and jurisprudence of almost all countries.

Between diplomatic agents, who are true public ministers, and consuls there are essential differences from their nomination to the time when their mission ends.

The former are provided with credentials addressed by the head of their State to the head of the State to which they are accredited. They are entitled to certain prerogatives as soon as they arrive and enjoy all their prerogatives in full as soon as they have presented their credentials.

Consuls, however, carry Letters Patent, signed, it is true, by the head of

the State, but drafted in the form of a letter of attorney or mandate to transact business with the civil, administrative and judicial authorities. Unlike diplomatic agents, consuls are not recognised as such directly they present their Letters Patent, but only when they have received their exequatur.

The jurisdiction of diplomatic agents always extends over the whole country to which they are accredited. That of consuls is limited by their Letters Patent and the exequatur granted them.

Diplomatic agents have a representative character which consuls do not possess. The latter, except in a few cases, do not transact business with the Minister for Foreign Affairs, but only with the local authorities of their area.

Whereas the former are political agents, the latter are only civil agents.

The attributes of diplomatic agents and of consuls differ to such an extent that it is hard to find any analogy between them, other than the protection which both diplomatic agents and consuls are bound to accord to their nationals.

Diplomatic agents are responsible for the major interests of their nation, good international understanding, and the preparation of treaties which guarantee those interests and consolidate good will.

Consuls are concerned with developing trade and watching over the interests of their nationals.

It is clear, therefore, that the former must, if they are to carry out their mission properly, possess certain prerogatives and privileges which originate in the representative character with which they are invested, whereas it is sufficient for consuls to possess the legal status which is indispensable for the discharge of their less-important duties.

We will consider separately each of the prerogatives which have given rise to discussion:

Exequatur.—Only when the exequatur has been granted may the consul communicate with the authorities and, generally speaking, perform his other duties. He cannot claim any privilege until he has received this document. The exequatur may be refused, or even withdrawn, without giving his Government a right to demand explanations from the Government of the country to which he has been accredited.

Inviolability of the consular archives.—This privilege, which must certainly be accorded to consuls, is indispensable to enable them to carry out their duties. The documents in the archives are the property of the foreign Government which installed the consulate, with the approval of the Government of the country. It would be a lack of courtesy towards the former Government if the secrecy of the archives were violated on any pretext whatever. Moreover, all countries, except England, recognise the inviolability of consular archives.

Immunity from civil jurisdiction.—This immunity, and indeed all immunity from jurisdiction, depends on the fiction of extra-territoriality which

can really only apply to diplomatic agents. Consuls, accordingly, are subject to local jurisdiction, and indeed a civil action would hardly prevent a consul from carrying on his duties.

As he possesses no immunity from civil jurisdiction, a consul should be subject to attachment of his property as security for his personal debts.

Immunity from criminal jurisdiction.—It would seem that, as a consul could not carry out his duties if he were placed under arrest, he should be allowed immunity in criminal matters. Against this, it may be argued that as the consul and the consulate are not the same thing, the arrest of the consul would not mean the discontinuance of the work of his country's consular service.

Such cases have often arisen in various countries, and judicial decisions have answered the question in the sense of disallowing any immunity, either civil or criminal, for consuls. We may quote the decision of the Court of Aix of April 14th, 1829, that of the Court of Rouen of June 27th, 1849, and the judgment delivered by the Tribunal de la Seine on January 21st, 1875. The last-mentioned judgment laid down that although consuls are entitled to carry out their duties without hindrance, they are, nevertheless, subject to the jurisdiction of the French Courts in all that concerns their private actions.

The foregoing observations, with respect not only to immunities but to all the privileges which should be refused to consuls, may be modified by bilateral treaties.

Right of asylum.—This right is a prerogative which need not be discussed; it is quite inadmissible. No State would admit such a privilege, and at the present time it ought no longer to exist, in however limited a form, even in the case of diplomatic agents.

Taxation.—The custom is to exempt consuls from direct and, occasionally, indirect taxation. Where no treaty exists, however, this privilege could not be claimed as a right. It is granted subject to the principle of reciprocity. We would propose to lay down that "consuls de carrière" not engaging in any form of trade in the country to which they are appointed should be exempted from taxation.

None of the foregoing remarks apply to consuls who are *Chargés d'Affaires*, since the second character invests them with the privileges and rights which international law accords to diplomatic agents.

Although the question of precedence is entirely unconnected with the legal status of consuls, we must mention it in this report because it forms the subject of a question submitted to our Committee for the Progressive Codification of International Law.

The rule applied to diplomatic agents should also be observed in the case of consular officials; that is to say, they should take precedence in each class according to the date of their *exequatur*.

Nevertheless, we would draw a distinction between "consuls de carrière"

and honorary consuls who are not nationals of the country which appoints them.

In the present stage of development of the institution of consuls and in the interest of the prestige of the career, the latter class of consuls should no longer exist. In point of fact, most honorary consuls of foreign nationality are far busier with their personal affairs than with those of the country which has conferred the title upon them, and as they generally engage in commerce in their consular area they occasion appreciable loss to other merchants. The commercial invoices submitted to them enable them to obtain valuable information which is of great use to them in their private affairs. They are thus able to compete on an unfair basis with the traders in their area. Moreover, nationals of the country which appoints these foreign consuls do not obtain from them the protection to which they are entitled and which they would always obtain from a consul of their own nationality.

Most of the countries in Europe have none but professional consuls, and it is to be hoped that other States will follow this example.

As honorary consuls of foreign nationality are not really public officials—for only nationals can be that—we propose that “consuls de carrière” should be given precedence over honorary consuls of foreign nationality of the same class, without taking into consideration the date of the *exequatur*. This means that honorary consuls-general will always come after other consuls-general in the town.

From the above it may be inferred that the regulation of the legal status of consuls by international agreement is not only desirable from every point of view but it is even indispensable, in order to avoid disputes which the absence of definite rules on the matter must certainly cause.

We do not think it necessary to define the functions of consuls by way of a convention, because these functions are perfectly well known and do not give rise to any disagreement, and because the determination of such functions is rather a matter of domestic law, since each State is alone able to determine the functions of its own officials.

(Signed) J. Gustavo GUERRERO,
Rapporteur.

A. MASTNY.

CONCLUSIONS AMENDED AS THE RESULT OF DISCUSSION IN THE COMMITTEE

Exequatur.—Only when the *exequatur* has been granted may the consul communicate with the authorities and, generally speaking, perform his other duties. He cannot claim any privilege until he has received this document. The *exequatur* may be refused, or even withdrawn, without giving his Government a right to demand explanations.

Consular archives and correspondence.—The consular archives are inviolable. The same rule should apply to official correspondence.

Immunity from civil jurisdiction.—The immunity from civil jurisdiction which is accorded to diplomatic agents cannot be applicable in a general manner to consuls who should only enjoy such immunity in connection with the exercise of their functions.

Immunity from criminal jurisdiction.—Consuls do not possess this immunity.

Right of asylum.—Consuls do not possess this prerogative.

Taxation.—Exemption from direct taxes should be accorded to "consuls de carrière," not carrying on any trade in the country where they exercise their functions.

None of the foregoing remarks apply to consuls who are *Chargé d'Affaires*, since the second character invests them with the privileges and rights which international law accords to diplomatic agents.

Although the question of precedence is entirely unconnected with the legal status of consuls, we must mention it in this report because it forms the subject of a question submitted to our committee for the Progressive Codification of International Law.

The rule applied to diplomatic agents should also be observed in the case of consular officials; that is to say, they should take precedence in each class according to the date of their *exequatur*.

Nevertheless, we would draw a distinction between "*consuls de carrière*" and honorary consuls.

We propose that "*consuls de carrière*" should be given precedence over honorary consuls without taking into consideration the date of the *exequatur*, which means that honorary consuls will always come after other consuls in the town.

From the above it may be inferred that the regulation of the legal status of consuls by international agreement is desirable from every point of view, and is even indispensable, in order to avoid disputes which the absence of definite rules on the matter must certainly cause.

The question of consular functions is reserved for later examination.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 10

Adopted by the Committee at its Third Session, held March-April 1927

REVISION OF THE CLASSIFICATION OF DIPLOMATIC AGENTS*

The Committee has the following terms of reference:

- (1) To prepare a provisional list of the subjects on international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the following questions:

"Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative case, to what extent should the existing classes of diplomatic agents be amalgamated, and should each State be recognized to have the right, in so far as existing differences of class remain, to determine at its discretion in what class its agents are to be ranked?"

The Committee reached this decision on the basis of a report submitted to it by a Sub-Committee consisting of M. GUERRERO, Rapporteur, and M. MASTNY. This report has been fully discussed by the Committee. It is to be understood that the Committee has not felt that it should at present pronounce upon the actual proposals presented in the report.

The Committee has the honour to request the various Governments to inform it whether they consider that these questions could advantageously be examined at the present moment with a view to the conclusion of a general convention.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of the Governments before December 31st, 1927.

The Sub-Committee's report is annexed to the present communication.
Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

* Publications of the League of Nations. V. Legal. 1927. V. 8.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: M. GUERRERO.

Member: M. MASTNY.

"Is it desirable to revise the classification of Diplomatic Agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative, in what form would this revision be made?"

[Translation.]

The classification of diplomatic agents which has hitherto been universally accepted in international relations is over a century old. It was established by the Regulation signed at Vienna on March 19th, 1815, between the eight Powers signatory to the Treaty of Paris of 1814: Austria, France, Great Britain, Portugal, Prussia, Russia, Spain and Sweden.

This is the text of the regulation:

"In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the Plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite the representatives of other crowned heads to adopt the same regulations.

"Article 1.—Diplomatic officials shall be divided into three classes: that of ambassadors, legates or nuncios; that of envoys, whether styled ministers or otherwise, accredited to sovereigns; that of *chargés d'affaires* accredited to ministers of foreign affairs.

"Article 2.—Only ambassadors, legates or nuncios shall possess the representative character.

"Article 3.—Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank.

"Article 4.—Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified. The present regulation shall not in any way modify the position of the Papal representatives.

"Article 5.—A uniform method shall be established in each State for the reception of diplomatic officials of each class.

"Article 6.—Ties of relationship or family alliances between Courts shall not confer any rank on their diplomatic officials. The same shall be the case with political alliances.

"Article 7.—In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

"The present regulation was inserted in the Protocol concluded by the

plenipotentiaries of the eight Powers which have signed the Treaty of Paris at their meeting on March 19th, 1815."

Three years later (in 1818), Austria, France, Great Britain, Prussia and Russia met in congress at Aix-la-Chapelle and laid down that ministers resident should form an intermediate class between agents of the second and third categories.

The following is the text of the Protocol of November 21st, 1818, regarding ministers resident:

"In order to avoid the possibility of unpleasant disputes with regard to a point of diplomatic etiquette for which the Annex to the Decision of Vienna, regulating the question of rank, seems to have made no provision, it is decided, as between the five Courts, that the ministers resident accredited to them shall take rank as an intermediate class between ministers of the second class and *chargés d'affaires*."

The preambles to these agreements show that their authors had two aims in view: the first was a mere pretense, while the other was real.

The first was ostensibly a desire to prevent disputes regarding precedence, though these could have been avoided without drawing up a graduated classification based on a fiction as weak as it is illogical, since the question of precedence was settled by Article 4 of the same Regulation of Vienna, namely: according to the date of the official notification of arrival to the country to which the diplomatic agents were accredited.

The other desire—which was certainly a real one—was to ensure a higher rank for the representatives of the great Powers.

As a matter of fact the plenipotentiaries, in conference at Vienna, first attempted to establish a classification of States and thus fix the order of precedence. When they saw how difficult a task this would be, they fell back on the classification of diplomatic agents.

The real meaning of the scale drawn up by the plenipotentiaries in 1815 is summarised in Article 2 of the Vienna Regulation: "Only ambassadors, legates, or nuncios shall possess the representative character."

What was then meant by the representative character? The right to represent the person of a sovereign and to have personal audience of the sovereign to whom the diplomat was accredited.

This definition, which, according to Pinheiro-Ferreira, defined nothing, was absolutely false, even at the time of its introduction, because, first, ambassadors did not represent the personal interests of their sovereign, and, secondly, it was only when they were accredited to one of the few absolute monarchies that ambassadors could transact business without the intervention of the Minister of State.

We might discuss this matter at some length, but since this is not a question of examining the opinions current at that period but of applying to modern international relations the opinion which prevails to-day, we will

not waste time in pointing out the errors of those who denied a representative character to diplomatic agents of the second, third or fourth categories.

In the present state of international law, the sovereign is no longer a crowned head placed at the apex of supreme power. The nation alone is sovereign, and only the nation's interests are entrusted to diplomatic agents. The latter, therefore, whether they are nationals of a great Power or a small State, a monarchy or a republic, or whether they be called ambassadors or ministers, all derive their mission from the same source. The interests which they have in their keeping are identical; the aim which they pursue is the same.

The credentials by which ambassadors and ministers plenipotentiary are accredited are absolutely identical, as are their rights and duties, the privileges and immunities granted them and the methods of communication with their own Governments and those to which they are accredited.

Therefore there is no longer any reason to place ambassadors in a higher category than ministers.

It may even be concluded that adoption of the classification of Vienna and Aix-la-Chapelle is unconstitutional in States in which the constitution recognises no other sovereignty than that of the nation.

If the false conception of the representative character which established a difference between ambassadors and ministers led to much criticism in the course of the last century, no fiction can possibly justify to-day the maintenance of different terms to designate persons who hold the same public office.

All writers on the subject share this view. We will quote some of them.

Kluber said in 1819 that, by reason of the matters with which he has to deal, a diplomatic agent must always be regarded as the immediate representative of his Government and that he consequently possesses the representative character. This quality, he adds, is essential and the same for all ministers to whatever class they belong.

Pinheiro-Ferreira wrote in 1830 that there ought no longer to be any ambassadors in diplomacy, because under the constitutional form of government which existed in all countries, it was recognized that direct negotiations between sovereigns were no longer desirable. And, he added, "when once this class (ambassadors) has been abolished as unconstitutional, as well as the ceremonial attaching to it, which is no longer in keeping with the customs and ideas of our times, the appellation 'ambassador' will naturally devolve on the ministers who are at the present time held to belong to the second class but who will henceforth occupy the highest diplomatic rank."

Pradier-Fodéré, referring to this passage in Pinheiro-Ferreira, says "the fulfillment of this hope would be in keeping with the modern trend of thought. It is certain that at the present time there should be only one category of public minister, since ministers no longer represent a master but only the interests of their nation, and because nations alone are sovereign."

Our eminent colleague José Leon Suarez wrote in 1919 that, since the only

source of diplomatic representation is national sovereignty, and since such sovereignty is absolute, it is clear that there can be only one "representative character" and that logically, therefore, only one class of representative ought to exist.

Albertini goes further and does not admit that there is any difference between a *chargé d'affaires* and an ambassador.

Fiore wrote on the same subject: "As Calvo wisely observes, it is very difficult to define the difference between diplomatic agents of the second class and those of the first class. Both are accredited in the same manner by their sovereign or by the head of the executive Power. Originally there was some excuse for the distinction between ambassadors and envoys, because it was admitted that the former were entitled to treat direct with the sovereign himself, whereas the latter, though accredited to the sovereign, could only treat with the Minister for Foreign Affairs. It was accordingly supposed that a person having such high authority as to be able to deal with the sovereign direct must be superior in rank to a public minister. To-day any such distinction would be erroneous, because Governments are now organised on a different basis and sovereigns are unable personally to direct international affairs. Consequently the attributes of the second categories of diplomatic agents are the same, the difference of title being merely hierarchic and honorary. As regards the privilege of treating with the sovereign direct, public ministers, to whatever class they belong, are entitled at the present time under all circumstances to have audience with the sovereign of the Court to which they are accredited on matters connected with political relations between the two States, though they rarely avail themselves of this privilege."

Baron de Szilassi, in his *Manuel pratique de Diplomatie moderne*, calls the ambassadorial system the ambassadorial "morgue." "The difference of rank which still subsists at the present time between ambassadors and ministers plenipotentiary is due to historical traditions rather than to the importance of the posts. Many a minister has a more important and more delicate task to carry out than his colleague who may be an ambassador in another capital, with duties merely representative. I think it would therefore be entirely logical to employ a collective term to designate all the diplomatic representatives belonging to this class, including the representatives of the Holy See."

All these writers, except the last, expressed their opinion long before the League was founded. Since the latter has inaugurated a system in which the equality of States is a fact, and since international law is developing a new spirit, it would indeed be more than strange if we continued to observe an obsolete tradition which has only survived through the negligence or complacency of so-called second-class States.

It cannot be argued that it was the collective will of the States, in adopting the classification of Vienna, to transform this tradition into a rule of international law. The establishment of numerous embassies between small

States, whether monarchical or republican, proves a definite intention to abandon the spirit which formed the basis of the 1815 agreement.

We therefore propose that ambassadors, legates or nuncios should be included in the same class and designation with envoys or ministers plenipotentiary, including resident ministers. These latter agents have, moreover, almost entirely disappeared from diplomatic nomenclature. It is very rare for a Government to give its representatives a title conferring on them the same responsibilities and the same duties as the other agents but placing them in a lower rank.

Chargés d'affaires should continue to form a class apart, not because they are different from other diplomatic agents as regards the interests they represent but because their credentials are given them by the Minister for Foreign Affairs and are addressed to Ministers for Foreign Affairs.

We still have to choose a common designation to be given to the diplomatic representatives of the first of the two categories we propose.

The choice lies among the following terms: ambassador, public minister, envoy, and agent.

We can straightway discard the expression "agent" which evokes an image of duties much less important than those entrusted to diplomatic representatives. We are also in favour of rejecting the expression "envoy" which could be kept as the title for "*chargé d'affaires*." The latter term is extremely ill chosen because all representatives are "*chargés*" with the public business of their country.

The adoption of the term "public minister" or "minister plenipotentiary" might appear to be somewhat derogatory to existing ambassadors, and our choice therefore inclines to the title "ambassador" to designate the representatives of the first three categories of the Regulation of Vienna as completed by the Aix-la-Chapelle Protocol.

Having shown the desirability of revising the classification of diplomatic representatives established by the Congress of Vienna and Aix-la-Chapelle, we think that the best solution would be to invite all States, Members or non-members of the League, to an international conference which would examine the question with a view to reaching a general agreement on some classification of diplomatic agents more suitable to the present general form of Governments and the spirit of the League of Nations.

(Signed) J. Gustavo GUERRERO,
Rapporteur.

A. MASTNY.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

QUESTIONNAIRE No. 11

Adopted by the Committee at its Third Session, held March-April 1927

COMPETENCE OF THE COURTS IN REGARD TO FOREIGN STATES*

The Committee has the following terms of reference:

- (1) To prepare a provisional list of the subjects on international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

The Committee has decided to include in its list the question of the Competence of the Courts in regard to Foreign States.

The Committee reached this decision on the basis of a report submitted to it by a Sub-Committee consisting of M. MATSUDA, Rapporteur, and MM. DIENA and DE VISSCHER, and of observations by M. DIENA, which remain annexed to the report.

After full discussion, the Committee was of opinion that, even though the conclusion of a uniform agreement between the Powers might meet with serious difficulties, these difficulties were not the same for all parts of the subject, and it felt that it was desirable to ascertain, exception always being made of the case of acts of State:

“Whether and in what cases, particularly in regard to action taken by a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State.”

The Committee has the honour to request the various Governments to inform it whether they consider that this question could advantageously be examined at the present moment with a view to the conclusion of a general convention which, if necessary, could be completed by particular agreements between groups or pairs of States.

The nature of the general question and of the particular questions involved in it appears from the report and from the observations mentioned above.

It is understood that, in submitting this subject to the Governments, the

* Publications of the League of Nations. V. Legal. 1927. V. 9.

Committee does not pronounce either for or against the general principles set out in the report and the observations or opinions expressed therein on the basis of those principles. At the present stage of its work, the sole, or at least the principal, task of the Committee is to direct attention to certain subjects of international law the regulation of which by international agreement may be considered to be desirable and realisable.

In order to be able to continue its work without delay, the Committee will be glad to be put in possession of the replies of Governments before December 31st, 1927.

The Sub-Committee's report, together with the observations above-mentioned, is annexed to the present communication.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: M. MATSUDA.

Members: M. DIENA.

M. DE VISSCHER.¹

"Is it possible to establish, by way of a convention, international rules concerning the competence of the courts in regard to foreign States, and, particularly, in regard to States engaging in commercial operations (excluding the questions already dealt with in the report sent to the Council of the League of Nations by the Committee of Experts at the Committee's second session)?"

[Translation.]

1. The question whether a State may, in any respect, be subject to the jurisdiction of the courts of another State is connected with the right of States to independence. In other words, are the Courts of one State competent to decide disputes to which another State is a party?

That the courts of one State are not competent with regard to another State is unanimously recognised when the foreign State is called to justice on account of acts committed by it, in the exercise of its sovereignty, to ensure the general administration of the country and the working of its public services. To weigh and judge the consequences of such acts would be to interfere in the internal policy of the foreign State and deny its right of independence. As regards acts of its Government and public administration, a State ought to be—as, indeed it is—entirely immune from the jurisdiction of another State. In almost all countries this is the decision which has been reached, and it is followed by most writers on the subject.

¹ M. De Visscher has not expressed his approval of this report; nor was he able to be present at the Third Session of the Committee.

There is, however, some difference of opinion when we come to consider acts accomplished by a State, not in fulfilment of one of its sovereign functions or governmental duties, but in the same way as a private individual, and, so to speak, in a private capacity. A State may, for instance, have been engaged in commercial transactions; in many countries the State is responsible for transport by rail. If it fails to execute the contract of transport, may it not be sued abroad by the consignor or consignee who has suffered from the non-fulfilment of the contract?

On this point there are two conflicting views.

II. An imposing body of case law, which has received the general approval of the French, German, British and American courts, renders exemption from jurisdiction an absolute immunity attaching to the very person of the foreign State, independent of the character of particular acts and removable only by express or tacit waiver by the State itself.

French practice has always been strongly opposed to the idea of such competence. Among the numerous decisions of the French courts the most important judicial ruling with regard to incompetence in civil proceedings directed against foreign sovereigns or States is that given by the Cour de Cassation on January 24th, 1849, in the action brought by Lambège and Pouget against the Spanish Government to secure payment for shoes supplied (*Journal du Palais*, 1849, I, 166; *DALLOZ*, 1849, I, 9). This decision, so to speak, crystallised French case law on the subject, and it is generally quoted by all who have subsequently studied the question. The decision is based on the following considerations: (1) The principle of the reciprocal independence of States precludes that any State shall, by reason of its acts, be subject to that jurisdiction which every Government possesses for the settlement of disputes connected with such acts. This exemption is a right inherent in its sovereign authority to which another State could not lay claim without compromising the relations of two States. (2) Article 14 of the Civil Code refers only to private obligations incurred by private individuals. (3) Any person whatsoever with whom a State enters into a contract agrees, by the very fact of entering into the contractual obligation, to abide by the laws of that State, its forms of accountancy and its judicial or administrative jurisdiction. (4) A foreign Government is not bound to recognise the decision of judicial or administrative authorities who have sanctioned the levying of an execution to its prejudice, but it can always claim repayment of the debt from its own debtor, so that the third party—the party who has actually been subjected to the execution—may have to pay twice over.

States are independent—i.e., the sovereign power of a State cannot extend beyond its own sphere and intrude into the sphere of another State to be exercised over persons and things within the domain of the other State. Nevertheless, a State may to a certain extent forego its sovereign rights in favour of another's sovereignty. This, however, can only take

place by means of an agreement between the two States freely consented by both. Failing such agreements, or customary law which has become established *de facto* apart from any such agreements, there can be no question of admitting the claim of one State to regulate, in accordance with its own views, the affairs or interests of another State. It should be observed that the independence and sovereignty of a State may be over-ridden and diminished not merely by some act in the territory of that State committed without its consent but also by the disregarding in foreign territory, without its consent, of any of its interests which are totally or partially situate in the foreign territory in question.

Far from leading us to the conclusion that the courts of a State may take cognisance of debts contracted by a foreign State or sovereign, the reciprocal independence of States tends rather to support the view that he who enters into a civil contract with a foreign State or sovereign implicitly agrees to abide by the civil competence and jurisdiction of the foreign courts. This argument was, in fact, put forward by the French Cour de Cassation in its ruling on January 24th 1849. Is it probable, that such State or sovereign, when creating such a legal nexus, can in any way intend to install another State or sovereign in its place and abdicate its own sovereignty in so doing?

Among the *German* decisions we may mention in particular that reached in the case *von Hellfeld v. the Treasury of the Russian Empire* (Prussian Tribunal for Disputes, June 25th, 1910).

At the end of 1904, the Russian Government purchased, at Tien-Tsin, from M. von Hellfeld, a retired German officer, certain guns and munitions which were to be transported to Port Arthur in a vessel that the Government was to provide for him. After fruitless negotiations, M. von Hellfeld finally sued the Russian Empire in the German courts for payment of its debt, and even attached at the Mendelssohn and Company Bank in Berlin funds which the Tsar's Government had deposited there. Russia protested against this action. An attachment order having been granted on December 15th, 1909, by the Berlin "Amtsgericht", the Ministry of Foreign Affairs opposed this decision on the ground of competence, and on June 25th, 1910, the Berlin Court for Conflicts of Competence annulled the order.

British practice has also followed this doctrine since the decision of the Court of Appeal in the "*Parlement Belge*" case (1880); and, since the famous decision reached by the Supreme Court in 1812 in the case of the ship *Exchange*, the *American* courts have adopted an identical standpoint, *i.e.*, absolute immunity from jurisdiction. These decisions are in keeping with the official attitude adopted by the majority of Governments, which have frequently pleaded the existence of an international usage sanctioning entire immunity from jurisdiction, even in the case of acts which are not, strictly speaking, acts accomplished by the public authorities as such.

Among writers who accept this theory we may mention: CHRÉTIEN, VALÉRY, NYS, DE LOUÏER, KOEHLER, LABAND, LISZT and ANZILOTTI.

BLUNTSCHLI, in his *Das moderne Völkerrecht* (§ 139), observes that civil proceedings cannot be taken against a foreign sovereign, even when they do not affect the public person of the sovereign but arise from private considerations. It is, he says, because the means of execution necessary to enforce the judgment, such as arrest, sequestration, declaration of bankruptcy and sale by order of Court would indirectly derogate from the inviolability, independence and majesty of the foreign sovereign, while the courts themselves would run the risk of seeing their authority disregarded abroad. To this doctrine Bluntschli only admits the following exceptions (§ 140): (1) actions *in rem* with regard to immovable property; (2) when the person enjoying extraterritoriality is a subject of the State—for instance, a merchant or employee; (3) if the competence of the State authorities with regard to the foreign sovereign has been recognised and embodied in an international convention; (4) if the foreign sovereign brings the action, or if, being the defendant, he recognises the competence of the judicial authorities of the State. In no case, however, does Bluntschli admit that a foreign sovereign can be subject to personal service.

CALVO, in his *Droit International Théorique et Pratique* (Paris, 1881, Vol. I, § 522), also shares the view that persons having claims on foreign sovereigns and Governments cannot serve process on the latter in their (the claimants') courts. He only admits exceptions if (1) the foreign sovereign is resident incognito in the State or (2) if the foreign sovereign expressly or tacitly accepts the jurisdiction of the State by a non-equivocal act. Apart from these cases, CALVO says: "The maxim *par in parem non habet imperium* is universally recognised, and, generally speaking, it may be said that all sovereigns are immune from the civil and criminal jurisdiction of foreign States."

According to VON HOLTZENDORFF, the judicial authority is not even competent to render executory and arbitral award over property belonging to a foreign State when the award has been given as between that State and a private individual (page 183). To this rule he only admits two exceptions: (1) in the case of immovable property possessed in the State by a foreign sovereign; (2) in the case of counterclaims brought against a foreign sovereign or Government by a private individual who has been sued by them.

WESTLAKE, in his *Treatise on Private International Law* (London, 1880, § 181), states that "foreign States and those persons in them who are called sovereigns, whether their title be Emperor, King, Grand Duke or any other, and whether their power in their States be absolute or limited, cannot be sued in England on their obligations, whether *ex contractu*, *quasi ex contractu* or *ex delicto*," and (§ 182) he adds: "He (the plaintiff) can no more pursue that claim indirectly through the agent than he could do so directly." To this general rule Westlake only admits the following exceptions: (a) when the whole subject-matter of the action is land situate within the jurisdiction of

the State; (b) in the case of actions brought by the foreign sovereigns themselves in the courts of the State; (c) cross actions and counterclaims brought against foreign sovereigns by private individuals sued by them.

In short, very eminent authors admit certain exceptions to the general theory of immunity from jurisdiction; some of these exceptions are already well known and defined, while others are still in a somewhat nebulous state. We should, however, observe that the case in which foreign States sue a private individual for a civil debt in the courts of his State is certainly not an exception. In point of fact, we have only heard the opposite case described, in which foreign States were defendants and not plaintiffs.

In this latter instance, the national courts are competent solely because the foreign State accepts their jurisdiction by laying the matter before them.

Readiness to submit to foreign jurisdiction may, of course, be tacitly implied or actually expressed. The latter case is the less frequent of the two. It may take the form of an international convention of a general nature concluded prior to the instance which recognises in principle the reciprocal competence of the courts of the two States; or it may be a special agreement, drawn up between a foreign State and a foreign individual, who is the other party to the contract, and inserted in the contract.

To hold or enjoy rights of possession or ownership over immovable property in a country constitutes, on the other hand, a tacit agreement to submit, as defendant, to the jurisdiction of the municipal courts.

All modern authors are, in fact, agreed that in all disputes *in rem* regarding immovable property, the judicial authorities of the State possess as full a jurisdiction over foreign States as they do over foreign individuals, whether as defendants or as plaintiffs.

A further instance is provided by contemporary practice. In a country where railways are State-owned, the State sends its trucks into the territory of a foreign State with which it has concluded a convention on railway transport. If the State establishes an agency in the foreign State for the transport of passengers or goods, any actions which may arise in the latter State with regard to transport operations must be brought before the local courts.

Exceptions similar to those which we have mentioned are numerous, and their number is likely to increase in view of the fact that the present tendency of States is to extend their activities beyond purely political and national spheres. In any case, the exceptions are always based on the tacit consent of States or sovereigns.

III. To the theory of absolute immunity from jurisdiction is opposed the Italo-Belgian system of immunity limited to acts that are true manifestations of sovereign authority and denied to acts in which the public power has no part and which should, therefore, be subject to the normal rules of jurisdiction. This theory of limited immunity has also been adopted by the Mixed Court of Appeals at Alexandria in the case of Captain Hale, commanding the *Sumatra*, versus Captain Bengoa, commanding the *Mercedes*

(decision of November 24th, 1920). The following authors are in favour of this conception: PRADIER-FODÉRÉ, DESPAGNET and DE BOECK, WEISS, MÉRIGNHAC, DE LAPRADELLE, AUDINET, LAURENT, VON BAR, PAEFE, PASQUALE FIORE.

It should also be borne in mind that, as far back as 1891, on the proposal of von Bar, the Institute of International Law adopted a draft regulation on the competence of courts in actions brought against foreign States, sovereigns and heads of State. According to this draft set of principles, the only actions which cannot be admitted are those brought as a result of acts of sovereignty or acts resulting from a contract concluded by the plaintiff in his capacity as a State official, and actions concerning the debts of a foreign State contracted by way of public subscription. On the other hand, the following actions are declared to be admissible: (1) Actions *in rem*, including actions for obtaining possession of property whether movable or immovable, situated in the territory. (2) Actions based on the capacity of the foreign State as heir or legatee of a national of the territory or as having a claim to a succession opened in the territory. (3) Actions connected with a commercial or industrial establishment or railway exploited by the foreign State in the territory. (4) Actions in which the foreign State has expressly recognised the competence of the court. A foreign State taking proceedings before a Court is held to have recognised the competency of that court as regards both the adjudication of costs and any counterclaim arising out of the same matter. Similarly, a foreign State, if it defends an action brought against it without raising objection as to the jurisdiction of the court, is held to have recognised that court as competent. (5) Actions arising out of contracts concluded by a foreign State within the territory, if full execution in that territory can be demanded as a result of an express clause or by reason of the nature of the action itself. (6) Actions for damages for a *tort* or *quasi-tort* committed in the territory.

Thus, according to this theory, the State possesses two aspects and practically constitutes two persons. From one point of view it is a person politic: from the other, a private person. What the State does *jure imperii* is one thing, and what it does *jure gestionis* is another. As a public person, the foreign State is not subject to the jurisdiction of the judicial authorities; but it may become subject thereto as a private person like foreign private individuals—indeed by analogy thereto—and in accordance with the principles of private international law which apply to private individuals in the matter of jurisdiction.

The rule of the mutual respect of sovereignty cannot claim to go further than the recognition of sovereignty which is its basis. The position of a State alters when, under cover of its civil personality, it enters into relations at private law which, by their nature, normally come within the competence of foreign jurisdictions. Of course, the juridical personality of the State is not really twofold, its mission always being to safeguard the general inter-

ests for which it is responsible; but certainly the activities of a State do assume two separate forms, and it is therefore desirable to consider the intrinsic nature of the acts and not merely their political purpose. This seems to be all the more just and equitable in that the sovereignty of a State is only entitled to respect so long as it remains within its proper sphere.

We must also be careful not to import into our discussion of this problem—which is an international one—certain provisions peculiar to the municipal public law of particular countries. The question is not one of apportionment of jurisdiction between the various organs of a given State but of the relations of that State, which, under the *jus gentium*, is a person, with other States. We cannot, therefore, use against the distinction between sovereign acts and non-sovereign acts, which is the foundation of the theory of the limited immunity of foreign States, certain objections of municipal law which have not the slightest bearing on international relations. This point of view is accepted implicitly by the partisans of absolute immunity when they admit the validity of voluntary waiver in disputes which do not involve the political power of the State, since this can only be explained by the principle of limiting non-interference to acts of the public power alone.

Indeed, if the exceptions to exemption from jurisdiction were based solely on the voluntary renunciation of a personal privilege, what would prevent a State from applying to a foreign court for sanction for the exercise of a sovereign right and from agreeing to a discussion of substance as to the consequences of an act of government? Case law, however, and most of the authorities on the subject, regard as inoperative any renunciation which tends to submit to the court any question as to assertion of a *sovereign* right or recognition of a *sovereign* act.

If, therefore, we adopt the theory of an immunity from jurisdiction limited to acts of sovereignty, the following are some of the solutions proposed:

Disputes may arise (a) between States or (b) between a foreign State and a private individual.

(a) The courts will be competent whenever the dispute involves no question of sovereign rights, *e.g.*, in a claim to an inheritance or an action *in rem* concerning immovable property. On the other hand, the court is bound to declare itself without jurisdiction in any dispute in which one Government claims sovereign rights in opposition to another.

(b) In disputes between a foreign State and a private individual, whether the State be plaintiff or defendant, its submission to the municipal jurisdiction is only comprehensible in matters of pure private law—that is to say, when it does not appear as a sovereign power asserting its right as a public authority. The refusal to consider the case is founded on the general principle of the mutual respect of sovereignty. Thus, any action brought by a foreign State to assert a sovereign right in the courts of another State must be disallowed, since the tendency of such an action would be to extend the

exercise of the plaintiffs' sovereignty over the territory of the latter State. A State cannot come forward like a private individual in a matter which involves the confirmation of a sovereign right. Nor can courts give a ruling with regard to the public acts of a foreign State appearing as defendant, owing to the respect due to foreign sovereignty. It is not permissible for the State which has been sued to renounce its right, for one State cannot be permitted to confer on the courts of another State a jurisdiction which they should be prevented from exercising for reasons of international public policy. Only in so far as it is subject to private law in a dispute at private law can a State validly submit, by tacit or expressed waiver, to the jurisdiction of another State.

The inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign Government may also apply in cases between private individuals, particularly when the right contested by the defendant is based on a public act of a foreign State and when the court cannot give an opinion regarding the object of the plea without discussing the merits of an act accomplished by a foreign Government. The same rule should apply where the defendant is sued personally for acts done by him in his capacity as a public official—though he no longer retains that capacity at the time of the proceedings—or under powers conferred on him by a foreign State.

In short, it is the intrinsic nature of the legal relations established by the foreign State which determines the extent of its immunity from jurisdiction. Outside the limits of its sovereign activity the State should be treated as an individual at private law and should consequently submit to the ordinary rules of jurisdiction.

An attempt has accordingly been made to solve the problem by recourse to the principles of civil jurisdiction which are applicable to foreign individuals. But this solution ignores the question whether such jurisdiction is compatible with the reciprocal independence of States. The latter problem is not directly treated; endeavours are made to solve it indirectly by drawing an analogy between the State and the foreign individual who is under a civil obligation towards a subject of the State. The adversaries of the theory point out that such an analogy (even were it proved, and they do not think it is) would not warrant a departure from the principle of the independence of States *inter se*.

In a judgment given on January 2nd, 1885, the Tribunal of the Seine decided that the first obstacle to jurisdiction over a foreign State is the impossibility of serving any writ on it by which proceedings can be commenced. This is perfectly true, for on whom can the writ be served? Not upon the foreign Government through the diplomatic channel, because the Government would, on the ground of its judicial sovereignty, refuse to accept service of writ by another State. Similarly, a judgment delivered against another State could not be carried out in that State. From a practical point of view, however, a judgment which cannot be rendered executory by the jurisdiction

which delivered it or by any other authority is not likely to be of much use to anyone or to fortify the prestige of the law.

Secondly, States do not often possess property abroad, so that, as a rule, the judgments could not be executed. The agitation in favour of the jurisdiction in question is, therefore, on the whole, likely, in many cases, to lead to no practical results.

But even in cases where States do possess property in the State of jurisdiction, there will be other *de facto* obstacles in the way of the execution of judgments delivered against such States as defendants. Thus the jurisdiction claimed over foreign States is illusory in countries where the courts admit that State property is immune from execution; while it is likely to become illusory wherever there is a tendency to admit this principle. What is the good of obtaining judgment against a debtor if you lack all legal means of compelling him to pay?

IV. Again, when does a State act in a public capacity and when does it act in a private capacity? Is there any hard-and-fast rule by which we can distinguish the acts of a State *jure imperii* from its acts *jure gestionis*? Seeing that the writers themselves hold most varied views on this subject, might it not be said that no such distinction really exists? Some writers declare that the difference lies in the object which the State has in view when contracting civil obligations. In other words, the question is whether its object is political or not. In their opinion, the purchase of horses by a foreign Government might be a business transaction or an act of sovereignty according to whether the horses were intended for the army or for the personal use of the prince. But this argument has been refuted, and rightly so, by LAURENT. For it contains, among others, the serious flaw, from a practical point of view, of being extremely vague. It is often very difficult, and at times impossible, to determine the ultimate aim of civil obligations contracted by foreign States. In these circumstances, would it ever be possible to draw a clear distinction between the imperium of a foreign State and its purely business activities, as a basis for asserting civil jurisdiction over that State?

V. Naturally, immunity from jurisdiction can only be admitted in the case of a properly organised State which is a member of the community of nations. A new State which aspires to an international existence and consequently claims the prerogatives appertaining to a "State" as such must obtain recognition by other States. This question arose in 1920 with regard to Bolshevik Russia, which the civilised States had not recognised, on an application made in London by certain British creditors to attach the furniture of the Russian Bolshevik Mission to England; there was no objection in law to the creditors taking such action in the British courts against the Bolshevik community.

In short, absence of jurisdiction of the courts of one State over another State is universally admitted where the foreign State is sued for acts accomplished by it in the exercise of its sovereign rights. But should the

exemption from jurisdiction be raised to an absolute immunity attaching to the very person of the foreign State, irrespective of the intrinsic nature of its acts, and incapable of being lost except by that State's express or tacit consent? Or should we, on the contrary, regard the immunity as limited and applying only to acts which are true manifestations of sovereign power? If we accept the first hypothesis, are we to consider as cases of tacit waiver: actions in *rem*, including actions for possession, concerning immovable or movable property held by the foreign State which is the defendant; cross actions brought against foreign Governments by individuals whom such Governments are suing; actions relating to a commercial or industrial establishment worked by a State or to a railway exploited in a foreign State with which the State in question has concluded a convention regarding railway transport; actions based on the foreign State's capacity of heir to an inheritance or beneficiary of a legacy within the territory; or, finally, actions for damages for a *tort* or *quasi-tort* committed in the territory?

But if we adopt the contrary standpoint, how can we draw a scientific and clear distinction between acts of sovereignty and ordinary business transactions? By what method can the foreign State be brought to court, or how can it be compelled to carry out judgments delivered against it if the Courts do not allow execution to be levied upon its property?

VI. *Conclusion.*—A. It is unanimously admitted that the courts of one State have no jurisdiction over another State when the foreign State is sued for acts accomplished by it in the exercise of its sovereign rights.

B. Apart from this case, the opinion of writers and experts in the various countries is divided.

(a) Some hold that absolute immunity from jurisdiction attaches to the very person of the foreign State; it exists independently of the intrinsic nature of the acts done and can only be lost by express or tacit waiver by the State concerned.

But in this case, are we, or are we not, to consider as cases of tacit waiver the following kinds of action:

1. Actions in *rem*, including actions for possession, concerning immovable or movable property held by the foreign State which is the defendant;
2. Cross actions brought against foreign Governments by individuals whom such Governments are suing;
3. Actions relating to a commercial or industrial establishment worked by a State or to a railway exploited in a foreign State with which the State in question has concluded a convention regarding railway transport;
4. Actions based on the foreign State's capacity of heir to an inheritance or beneficiary of a legacy within the territory;
5. Actions for damages for a *tort* or *quasi-tort* committed in the territory?

(b) Those who are most opposed to absolute immunity from jurisdiction say that such immunity only applies to acts which are true manifestations of sovereign authority.

But, if so, how can we draw any scientific and clear distinction between acts of sovereignty and other acts?

C. There can be no doubt that since the last century the activities of the State in the economic, financial and industrial spheres have developed to such an extent as to render it an increasingly common occurrence for it to come into contact with private individuals, particularly in connection with large undertakings.

In these circumstances it might be just to recognise that there are cases in which acts done by a foreign State and leading to a dispute ought to be treated by the law as acts of a private individual.

Working on these lines, certain lawyers and judges have endeavoured to build up a new legal theory to provide what they hold to be a more rational solution for difficulties which are becoming greater everyday.

At the present time, however, it would be hard to extract from the above tendency any definite or precise conclusion which could be used as the basis for a uniform arrangement to be concluded between the Powers.

Rome, October 11th, 1926.

(Signed) M. MATSUDA,
Rapporteur.

OBSERVATIONS BY PROFESSOR GIULIO DIENA

At the end of August, His Excellency M. Matsuda was good enough to send me, as a member of the Sub-Committee on this subject, his report, accompanied by a courteous and friendly letter.

I felt it my duty to study this report immediately with the greatest care, and it has given me much pleasure to see that M. Matsuda has adopted the excellent course of examining the problem from all points of view.

M. Matsuda's report is characterised by the absolute impartiality with which he states and weighs the various shades of doctrine and the many solutions adopted in different countries. I therefore think that this report, being of so highly objective a character, should constitute an excellent basis for the discussions of our Committee.

I can only congratulate the Rapporteur and thank him—at any rate personally—for his valuable contribution to the question.

Only with regard to the final conclusion of M. Matsuda's report do I feel bound to offer certain comments.

"In these circumstances," the Rapporteur observes, "it might be just to recognise that there are cases in which acts done by a foreign State and leading to a dispute ought to be treated by the law as acts of a private individual.

"Working on these lines, certain lawyers and judges have endeavoured to build up a new legal theory to provide what they hold to be a

more rational solution for difficulties which are becoming greater every day.

"At the present time, however, it would be hard to extract from the above tendency any definite or precise conclusion which could be used as the basis for a uniform arrangement to be concluded between the Powers."

Were this merely an academic discussion, I might perhaps, with certain reservations, agree with the Rapporteur's views, but I fear that, in our Committee, these conclusions may contain a hidden danger. We should remember that we are at present engaged solely in drawing up a list of questions regarding which it would be *desirable and realisable* to reach an international agreement. M. Matsuda's report clearly shows that an agreement on the question now under consideration would be desirable; but his report may give the impression that such an agreement may not be realisable. In that case a further conclusion might be drawn from his own conclusion—that it would be better to eliminate the question itself from the list which it is the duty of our Committee to draw up. I fancy—at any rate I hope—that this is not the intention of our eminent Rapporteur; but I think it is better to make the point clear and state my reasons.

In his conscientious study of the question in its present state, M. Matsuda has shown that even those who are agreed that *in principle* all States should be free from the jurisdiction of a foreign State admit that it is logical—apart from acts of sovereignty—to allow certain exceptions to this principle.

Now, in my opinion, these exceptions are the portal beyond which there opens out a vista of possible agreements between several States on the question now under review.

In very recent Italian practice, there are certain decisions which can be quoted in support of this opinion. A few months ago, the Italian Cour de Cassation had in two instances occasion to deliver judgment (all sections meeting together) on the point we are now considering, in decisions dated respectively June 12th, 1925 (*Rivista di Diritto Internazionale*, 1926, page 249), and March 13th, 1926 (*Rivista di Diritto Internazionale*, 1926, page 252).

The second decision is the more important from the point of view of doctrine, for it quite explicitly lays down that a foreign State, *in the matter of relations at private law*, is subject to the jurisdiction of the Italian Courts in the same way as individuals of foreign nationality. But it is not this decision which need occupy our attention for the present, because it does not seem likely to facilitate an agreement between Italy and the States which, on this point, adopt an opposite policy.

The other decision of the Italian Supreme Court on June 12th, 1925, is far less categorical and better calculated to serve as an indication of the path by which international agreement may be reached. In this decision, the court fully recognised that, according to a widely admitted doctrine, the

courts of one State have not *in principle* any jurisdiction over a foreign State, though, the decision added, the same doctrine admits that this rule is not absolute, since it allows exceptions—for instance, when the foreign State itself waives the immunity from jurisdiction. The Court then pointed out that a foreign State renounces this immunity not only when it comes forward as a plaintiff in the municipal courts but also when it accomplishes acts by which it engages in trade or in industry on Italian territory. On this ground, the Court held that the Italian judicial authorities possessed jurisdiction over the State of Russia, having come to the conclusion that the latter, through its agents, was engaging in trade in Italian territory.

I cannot, of course, mention all the cases in which we should endeavour to agree to allow—if only as an exception—the jurisdiction of municipal courts over foreign States. In this connection I can only refer to the excellent and very judicious proposals and suggestions contained in M. Matsuda's report. I would merely point out that the possibility of international agreements on this subject is proved by the fact that one is already in existence¹.

Quite recently—on April 10th, 1926, to be precise—the text of a collective convention for the unification of certain rules with regard to State-owned vessels was signed at Brussels. Whereas Article 1 of this convention makes States possessing or operating vessels for the transport of cargo and passengers subject to the same rules, as regards responsibility, and the same obligations as those incurred by privately owned vessels, Article 2 is worded as follows:

“As regards these responsibilities and obligations, *the rules concerning the competence of the courts, actions at law and procedure*, shall be the same for merchant vessels owned by private persons and for private cargoes and their owners.”

This provision could not have been adopted had there been invariable and insuperable difficulties in the way of serving a writ on a foreign State.

A judgment properly delivered loses none of its legal and moral force, even if some difficulty is encountered in having it executed. It is quite conceivable, moreover, that it may be lawful to levy execution on the property which a State possesses abroad if the property in question is not used for the public service.

True, it is occasionally—in fact often—difficult to draw a clear distinction between acts done by a State as sovereign power and acts accomplished by it in a private capacity. But difficulties of this nature are often encountered in international law, and the fact does not of itself warrant the elimination of the distinction.

It is, for example, generally recognised that consular agents are not subject

¹ Cf. Article 53, paragraph 2, of the International Convention of Berne of October 14th, 1890, on the Transport of Goods by Rail.

to the local jurisdiction as regards acts accomplished in the exercise of their duties, but that they do not enjoy the same prerogative in respect of acts done by them in a private capacity. Does not this discrimination also cause difficulties in practice? It certainly does, but that does not prevent general agreement to admit the rule.

It has also been urged that the principle of immunity from municipal jurisdiction is founded, in the case of States, on international custom. Even if there were no doubt as to the existence of this alleged custom, that should not be an absolute obstacle to our making a suggestion which, if adopted, would constitute progress in positive international law. (We should not forget that our Committee has been set up to work for the *progressive* codification of international law.)

But is it absolutely certain that such a custom really exists? If it existed, Italian and Belgian legal practice would be an unfailing source of diplomatic incidents. In actual fact, however, unless I am misinformed, such incidents occur very rarely if at all.

In proof of the existence of this custom, certain Italian jurists, desiring to combat the legal practice of their own country, have quoted Article 281 of the Treaty of Versailles and Article 233 of the Treaty of Saint Germain, which run as follows:

"If the German (or Austrian) Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."

The jurists in question have asserted that this provision would have been unnecessary if any custom had existed to the contrary. I do not, however, think that this line of reasoning is sound. It seems to me that the true explanation is a simpler one. It is enough to point out that, since we are faced with an international rule (that of immunity) which is quite nebulous, the authors of the Treaty of Peace availed themselves of the opportunity offered of adopting, as regards the relations of one of the contracting States with the other parties, a thoroughly clear and definite rule, in favour of the latter parties for whom the question is not in any way prejudged by the Treaty.

But apart from the Treaties of Peace, in the making of which it happened that one of the contracting parties had no opportunity to discuss in full freedom all the clauses which were adopted, it will be found that quite similar rules were embodied in the Treaties concluded by Russia after the establishment of the Soviet Government, and it certainly cannot be alleged that these Treaties were *imposed* on Russia.

For instance, in Article 13 of the Treaty of May 6th, 1921, between Germany and Russia it is laid down that, "As regards transactions and relations of private law concluded or established in Germany and the economic consequences thereof, the Russian Government submits to the jurisdiction

of and to measures of execution by the German judicial authorities, so far as regards relations resulting from contracts made with German nationals, firms or corporations". Article 12 of the Austro-Russian Agreement of December 7th, 1921, is couched in the same terms.

In Article 3 of the Italo-Russian Agreement of February 7th, 1924, the text is not so explicit as those mentioned above, but it can, nevertheless, be interpreted in the same manner. According to this article, the Government of the Union assumes responsibility for all business transacted by its commercial representatives in Italy and merely stipulates that the goods concerned in these transactions shall not be subject to judicial measures of a *preventive* character. Thus, the Russian Government has implicitly admitted that, apart from the above, the Italian courts may exercise jurisdiction over it with regard to business transactions carried out by it in Italy. This is also, as we have pointed out above, the result reached by the Italian judicial authorities.

I therefore think we can conclude (and I hope that our distinguished Rapporteur will agree) that the question of the competence of courts with regard to foreign States should be regarded by our Committee as a question concerning which an international agreement is not only desirable but also realisable.

Milan, October 1st, 1926.

(Signed) GIULIO DIENA.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

THE MOST-FAVOURED-NATION CLAUSE *

Report Adopted by the Committee at its Third Session, Held in March-April 1927

The Committee is acting under the following terms of reference:

- (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

At its second session, the Committee appointed a Sub-Committee, composed of Mr. WICKERSHAM, Rapporteur, and M. Barbosa DE MAGALHÃES, to consider the question:

“If it be possible, and in what degree, to reach an international agreement concerning the principal means of determining and interpreting the effects of the most-favoured-nation clause in treaties.”

After a close study of the questions raised in the report drawn up by Mr. Wickersham and in the observations thereon made by M. Barbosa de Magalhães, the Committee has found that international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles. The Committee has therefore considered that the above question should not be placed on its provisional list.

On the other hand, the Committee decided to communicate to the Governments Mr. Wickersham's report¹ and M. Barbosa de Magalhães's observations,² in order to enable them to profit by the light thrown on the matter in these documents and to form a clearer view of the position.

(Signed) HJ. L. HAMMARSKJÖLD,

Geneva, April 2nd, 1927.

Chairman of the Committee of Experts.

* Publications of the League of Nations. V. Legal. 1927. V. 10.

¹ See Annex 1, p. 134.

² See Annex 2, p. 153.

ANNEX 1

REPORT OF THE SUB-COMMITTEE

Rapporteur: Mr. WICKERSHAM.

Member: M. BARBOSA DE MAGALHÃES.

"If it be possible, and in what degree, to reach an international agreement concerning the principal means of determining and interpreting the effects of the most-favoured-nation clause in treaties."

THE MOST-FAVOURED-NATION CLAUSE

"It is always a matter of importance to a State to be assured that the treatment its citizens receive at the hands of another shall not be less favourable than that which the other accords to the citizens of a third State. The principle of the most-favoured-nation treatment is based upon the conception that a State is entitled to, and should grant, equality of treatment in commercial relations. As a safeguard against oversight at the moment of negotiation, and to obviate the necessity of subsequent negotiations, the provision known as the most-favoured-nation clause was devised to ensure to the contracting States not only the benefit of concessions previously made but also of those subsequently to be made by either of the contracting States."—*International Economic Policies*, by William Smith CULBERTSON, page 56. (See also United States Tariff Commission, *Handbook of Commercial Treaties*, pages 2 and 3.)

"De las diversas materias contenidas generalmente en los Tratados de comercio, la estipulación del tratamiento de la Nación mas favorecida ha sido objeto no solo de discusión academica por parte de las expositores sino también entre los hombres de Estado que sostienen contrarios puntos de vista sobre la política comercial que aquella cláusula entraña. Su redacción e interpretación ha originado así mismo controversias entre los Gobiernos, constituyendo por ello uno de los capítulos más interesantes del derecho comercial internacional."—*La Clausula de la Nación Mas Favorecida*, por Enrique O. HERRERA, page 42.

Provisions relating to treatment of the nationals of one party by those of the other occur in commercial treaties in a large variety of forms. Generally speaking, they may be divided into two forms: promises of national treatment and promises of most-favoured-nation treatment.

By national treatment is meant a promise that the inhabitants of one of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, just as if they were natives of the second contracting party. An example is furnished by the treaty between the United States and Great Britain of 1815:¹

¹ All American treaties are to be found in MALLOY'S collection of American treaties, Senate documents 47-48, Sixty-first Congress, Second Session.

"No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of His Britannic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels."

The effect of national treatment is to prevent discrimination against the nationals of the contracting parties, in any way, in regard to the points stipulated in the treaty.

Most-favoured-nation treatment, on the other hand, is a promise that the inhabitants of the contracting parties shall be treated in the respects agreed to, in the territory of the other contracting party, no more unfavourably than any other foreigner. A usual form of the clause is furnished by the following in the Treaty of 1826 between the United States and Denmark.

Article IV.—"No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed on the importation into the said dominions of any article the produce or manufacture of the United States, than are or shall be payable on the like articles being the produce or manufacture of any other foreign country."

Under this clause, the nationals of one of the contracting parties may be discriminated against as compared with the nationals of the nation giving the promise, but must be given treatment at least as good as those of other countries.

It will be seen, then, that national and most-favoured-nation treatment are the same in principle; but that national treatment, guaranteeing perfect equality, is much broader than most-favoured-nation treatment, which excepts from its promise of equality favours to its own nationals. National treatment as yet has not been applied to tariff schedules, except for one tentative experiment by Great Britain,¹ for national treatment of a nation's products amounts to free trade; but it has been applied in one treaty or another to almost every other subject dealt with in commercial treaties. Most-favoured-nation treatment is usually employed as a residual clause to cover subjects not granted national treatment and generally includes duties on merchandise, as it is consistent with any protective tariff which does not discriminate against one nation in favour of another.

The most-favoured-nation clause is sometimes unconditional, sometimes conditional.

The unconditional form simply provides that every favour extended by

¹ These are contained in the Treaties of 1862 with Belgium and 1865 with Prussia, and provide for treatment of those nations in British colonial possessions on the same terms as Britain herself.

one contracting party to a third party shall be immediately and unconditionally extended to the other party: the conditional provides that every favour extended by one contracting party to a third party shall be extended to the other party "freely if the concession was freely made, or by allowing the same compensation if the concession was conditional." (See Treaty between United States and Colombia, October 3rd, 1824: 1 MALLOY, page 293.)

The European States, and principally Great Britain, early adopted as a distinct principle the unconditional form of the most-favoured-nation clause, while the American theory, acted upon until 1923 with few exceptions, was that the most-favoured-nation treatment implied specific reciprocity—that is, that the privileges or concessions extended by one of the contracting States to a third State might be claimed by the other State freely when such favours or concessions had been freely granted and on the basis of a satisfactory equivalent, when the concession to the third State was the result of an ascertained equivalent (*La Clausula de la Nación Mas Favorecida*: HERRERA, pages 46-47).

A typical expressly unconditional clause is found in the Treaty of 1911 between Great Britain and Japan, Article XXIV:

"The high contracting parties agree that, in all that concerns commerce, navigation, and industry, any favour, privilege, or immunity which either high contracting party has actually granted, or may hereafter grant, to the ships, subjects or citizens of any other State shall be extended immediately and unconditionally to the ships or subjects of the other high contracting party, it being their intention that the commerce, navigation, and industry of each country shall be placed on the footing of the most-favoured-nation."

A typical expressly conditional clause is found in the Treaty of 1778 between the United States and France, Article II:

"The most Christian King and the United States engage mutually not to grant any particular favour to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favour freely if the concession was freely made, or on allowing the same compensation if the concession was conditional."

The effect of such a clause as the unconditional clause quoted above is to extend automatically and without compensation every favour granted to another nation, no matter what the circumstances; while the effect of such a conditional clause as quoted is to except from its operation all favours obtained by granting an equivalent—that is, by bargain or reciprocity agreement—except on the payment of a like consideration.

All favoured-nation clauses in treaties, however, are not expressed as

clearly as those quoted, and less precise formulations have given rise to difficulty of interpretation and uncertainty in application. Such expressions as "treatment as favourable as any other country," "the commerce of the two countries is to be on the footing of the most-favoured nation"; "any favour, privilege or immunity granted by either contracting party to any third State shall be likewise accorded to the other contracting party"—all are open to different constructions and may be classified as "equivocal clauses." They are subject to interpretation as conditional or unconditional.

The following are some other examples of unconditional clauses:

"No other or higher duties shall be paid by Americans on goods imported into Japan than are fixed by this treaty, nor shall *any* higher duties be paid by Americans than are levied on the same description of goods if imported in Japanese vessels or the vessels of *any* other nation."¹

"Each of the high contracting parties engages to extend to the other *any* favour, *any* privilege or diminution of tariff which either of them may grant to a third power in regard to the importation of goods. . . ."²

An example of an "equivocal" pledge:

"In future and forever, after the expiration of the twelve years, the ships of France shall be treated in the ports above mentioned upon the footing of the most-favoured nation."³

The unconditional form is practically universal now, and, with the exception of the period of about thirty years between 1830 and 1860, has always been in the overwhelming majority. The United States has always consistently used the conditional form of the clause, which also has been followed widely in Spanish America.

The following clauses, which may be denominated as "specific"—that is, clauses limited only as to subject-matter—may be considered as unlimited.

A. *The regular types*, which are bilateral, unlimited, and:

(1) Expressly unconditional; such, for example, as is contained in the Treaty of 1881 between the United States and Serbia:

"Also every favour or immunity which shall be later granted to a third Power shall be immediately extended and without condition, and by this very fact, to the other contracting party."

(2) Expressly conditional; as, for example, in the Treaty of 1824 between the United States and Colombia:

"The United States of America and the Republic of Colombia, desiring to live in peace and harmony with all other nations of the earth, by means of a policy frank and equally friendly with all, engage mutually

¹ United States-Japan, 1878, Article II.

² Great Britain-France, 1860, Article V.

³ United States-France, 1803, Article VIII.

not to grant any particular favour to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional."

(3) Unconditional; as, for example, in the Treaty of 1837 between the United States and Greece:

"The two high contracting parties engage not to impose upon the navigation between their respective territories in the vessels of either, any tonnage or other duties of any kind or denomination which shall be higher or other than those which shall be imposed on every other navigation."

(4) Equivocal; as, for example, in the Treaty of 1856 between the United States and Persia:

"The citizens and subjects of the two high contracting parties—travellers, merchants, manufacturers, and others—who may reside in the territory of either country shall be respected and efficiently protected by the authorities of the country and their agents, and treated in all respects as the subjects and citizens of the most-favoured nation are treated."

B. *The irregular forms:*

(5) Limited, reciprocal and unconditional:

The Treaty of 1903 between Italy and Cuba contains a regular unconditional most-favoured-nation clause, followed by the following provision:

"It is understood that the provisions laid down in the foregoing articles do not cover the cases in which Cuba may grant special reductions on its Customs duties to the produce of other American States. Consequently, such concessions cannot be claimed by Italy on the grounds of its being the most-favoured nation, except when they be granted to another State which is not American."

(6) Limited, reciprocal, conditional:

The treaty of 1828 between the United States and Brazil contains a regular conditional clause, with the addition of the following provision:

"It is understood, however, that the relations and conventions which now exist, or may hereafter exist, between Brazil and Portugal shall form an exception to this article."

(7) Unilateral, unconditional, unlimited:

An example is to be found in the Treaty of 1856 between the United States and Siam, as follows:

"The American Government and its citizens will be allowed free and equal participation in any privileges that may have been, or may hereafter be, granted by the Siamese Government to the Government, citizens, or subjects of any other nations."

(8) Unilateral, unconditional, limited:

Such a clause is found in the Treaty of 1854 between Great Britain and Japan, as follows:

"In the ports of Japan either now open or which may hereafter be opened to the ships or subjects of any foreign nation, British ships and subjects shall be entitled to admission and to the enjoyment of an equality of advantages with those of the most-favoured-nation, always excepting the advantages accruing to the Dutch and Chinese from the existing relations with Japan."

(9) Unilateral, conditional, unlimited:

An example is furnished in the Treaty of 1882 between the United States and Korea, as follows:

"The high contracting Powers hereby agree that, should at any time the King of Chosen grant to any nation, or to the merchants or citizens of any nation, any right, privilege or favour connected either with navigation, commerce, political or other intercourse, which is not conferred by this Treaty, such right, privilege and favour shall freely inure to the benefit of the United States, its public officers, merchants, and citizens, provided always that, whenever such right, privilege or favour is accompanied by any condition or equivalent concession granted by the other nation interested, the United States, its officers and people shall only be entitled to the benefit of such right, privilege or favour upon complying with the conditions or concessions connected therewith."

It may be stated broadly that the clause may apply to every right, privilege or immunity which the State grants in its public capacity, but not to private rights or privileges which it grants as an individual. For instance, France may claim for her subjects the privilege granted to British subjects to import certain articles at lower tariff rates, or to hold land in the United States, or to maintain suits in the American courts, or to maintain a residence in the United States. But she could not claim the right to share a contract of the United States Government with a British company for the furnishing of material, or in a grant of public lands to a British subject.

The favours embraced in the most-favoured-nation clause are those which a State may grant in its governmental, as distinguished from its business, activities.

Provisions in commercial treaties may be as wide and diversified as the

objects, interests, activities and instruments of commerce and industry in all their phases, so as to protect the rights and interests of nations and individuals participating in "commercial and industrial development on an international scale." (See United States Tariff Commission: *Handbook of Commercial Treaties*, page 9.)

Bearing in mind that any favour which a State may grant as a public right may be claimed under an unlimited favoured-nation clause, it would be idle to attempt a list of subjects which are or may be subject to most-favoured-nation treatment.

DURATION OF THE PRIVILEGE

Questions have arisen as to whether, when a nation has had to grant a favour to another, by force of the most-favoured-nation clause, because it has conceded the same to a third State, the latter ceases to be entitled to the privilege when the privilege of the third State comes to an end. On this point there is a difference of opinion. M. LEHR 25 (*Revue de Droit International*, 313) thinks that if the right to the favour has been accorded automatically as a matter of course, by the operation of the most-favoured-nation clause, it is wholly dependent upon the primary right or favour, and falls with it; but if the nations have entered into a separate agreement regarding the extension of the favour to the claiming nation, there is an independent promise, and the right of the claiming nation rests upon the latter and not upon the operation of the most-favoured-nation clause. Mr. HORNBECK (*op. cit.*, 65) takes the opposite view; but the difference appears to be not so much as to the principle involved as to its application in particular cases, especially as to what constitutes an independent promise in a given case. The opinion of M. Lehr would seem to be sound.

APPLICATION OF CLAUSE TO FUTURE FAVOURS

Whether or not the clause applies to future as well as to past favours is much discussed by writers, although no actual case has been found in which the question was raised. A majority of the writers consider that the clause should apply to all favours, past or future. Those who take the opposite view base their opinion upon the fact that in many, perhaps a majority, of treaties the clause specifically provides that it shall apply to all favours past or future. But it is well known that such a provision often is inserted avowedly out of abundant caution and without consideration of the possible interpretation put upon it as above referred to.

APPLICATION TO COLONIES OF CONTRACTING STATES

It is a generally accepted principle that relations between a mother-country and her colonies are not to be taken as bases for the application of the most-favoured-nation clause. Some questions have, however, arisen as to

what is a colony, particularly with respect to the dominions of the British Empire.

At first, the English Government recognised the application of the favoured-nation clause to colonial tariff preferences (see Treaties with Belgium, 1862; with Prussia, 1865), but the rule is now recognised, as stated by M. DE VISSCHER (*op. cit.*, 80) that, "lorsqu'on a voulu stipuler qu'on serait traité dans les colonies d'un Etat sur le même pied que la mère-patrie, on a toujours reconnu que la clause ordinaire de la nation la plus favorisée ne suffirait pas à garantir un tel traitement, et on l'a toujours stipulé expressément et séparément."

Practically all the recent British treaties provide that the Dominions (Canada, Australia, South Africa, India, Irish Free State) are not to be bound by British treaties unless they separately elect to adhere, and that they may separately withdraw from any such treaty.

Provisions in regard to the application of the clause to British colonial possessions are to be found in practically every recent British treaty. For instance, the Treaty of 1907 between Great Britain and Serbia "does not apply to British colonies, possessions or protectorates beyond the seas, except those adhering thereto before April 1st, 1909. Nevertheless, products of any British colony, etc., receive in Serbia complete and unconditional most-favoured-nation treatment so long as such colony, etc., accords, to Serbian goods, treatment as favourable as to products of any other foreign country; Serbia to receive reasonable notice from any British colony, etc., intending to withdraw from such treatment theretofore accorded to Serbian products." (United States Tariff Commission, *Handbook of Commercial Treaties*, 356. See also the other British treaties therein contained for other examples.)

Article IX of the Mutual Guarantee Treaty of the Locarno Series provides: "The present treaty shall impose no obligation upon any of the British dominions or upon India unless the Government of such dominion or of India signifies its acceptance thereof."

NON-APPLICATION RESPECTING SPECIALLY LOCATED REGIONS

Small areas locally contiguous form an exception to the operation of the clause—for example, border traffic between two villages, or in a town through which runs the international boundary line. Sometimes this rule applies to exceptional relations between two countries, as, *e.g.*, between the United States and Hawaii (before its annexation), Cuba, or even Canada.

INTERPRETATION OF CLAUSE AS CONDITIONAL OR UNCONDITIONAL

In the interpretation of the clause, the meaning of the word "favoured" must first be determined. The question arose between the United States of America and France in 1817. By an Act of Congress of March 3rd, 1815, the vessels of foreign countries were exempted from discriminating duties in ports of the United States on condition of the exemption of American vessels

in ports of such countries. This exemption was granted by Great Britain but not by France, with the result that French vessels continued to pay discriminating duties in the ports of the United States, while British vessels became exempt. By Article 8 of the Treaty of April 30th, 1803, ceding Louisiana to the United States, it was provided that "the ships of France shall be treated upon the footing of the most-favoured nation" in the ports of the ceded territory. By virtue of this provision, the French Government asked that the advantages granted to Great Britain in all the ports of the United States should be secured to France in the ports of Louisiana. This was denied, upon the ground that the clause did not mean that France should enjoy as a free gift that which was conceded to other nations for a full equivalent.

"It is obvious," said Mr. Adams, "that if French vessels should be admitted into the ports of Louisiana upon the payment of the same duties as the vessels of the United States, they would be treated, not upon the footing of the most-favoured nation, according to the article in question, but upon a footing more favoured than any other nation; since other nations, with the exception of England, pay higher tonnage duties, and the exemption of English vessels is not a free gift but a purchase at a fair and equal price." (5 Moore's *Digest*, 257.)

France, however, did not concede the correctness of this position, and maintained her claim in diplomatic correspondence until 1831, when it was settled by a treaty which practically accepted the American interpretation. The only exception made by the United States to the uniform construction placed upon the most-favoured-nation clause in treaties entered into by it is furnished by her Treaty of 1850 with Switzerland.

In 1898, Switzerland claimed the benefit of the concessions which were granted by the United States to France in a reciprocity agreement authorised by the Tariff Act of 1897. The most-favoured-nation clause appears in the following articles in the Swiss Treaty of 1850, viz.:

"Article VIII.—In all that relates to the importation, exportation and transit of their respective products, the United States of America and the Swiss Confederation shall treat each other, reciprocally, as the most-favoured nation, union of nations, State or society, as is explained in the following articles:

"Article IX.—Neither of the contracting parties shall impose any higher or other duties upon the importation, exportation or transit of the natural or industrial products of the other than are or shall be payable upon the like articles, being the produce of any other country not embraced within its present limits.

"Article X.—In order more effectually to attain the objects contemplated in Article VIII, each of the contracting parties hereby en-

gages not to grant any favour in commerce to any nation, union of nations, State or society which shall not immediately be enjoyed by the other party."

In addition to the provisions of the treaty as above stated, there was an understanding between the negotiators of the treaty, acquiesced in by their respective Governments, that the clause should be unconditional.

Such an understanding would, however, be unnecessary, for the most-favoured-nation treatment provided for is expressly said to be defined "in the following articles," and the "following articles" provided: (1) that no other or higher duties should be levied than on the commerce of *any* other nation; (2) that every favour granted by either of the parties to *any* other nation should be immediately extended to the other party. These are clearly enough unconditional pledges, the first, in Article IX, being unconditional, and the second, in Article X, being non-conditional, with the addition of the word "immediately," which might have the effect of making the clause expressly unconditional. But since there could be some question as to the time of application of the clause (*i.e.*, automatically or upon request), it would seem that the word "immediately" was inserted out of caution to ensure automatic extension, though it is well settled that such extension is automatic. To construe it to mean "unconditionally" would be straining the word.

But the clauses are both clearly non-conditional, even if the second is not expressly unconditional, and they should be treated as unconditional, especially in view of the understanding of the negotiators that they should be so construed.

When M. Pioda, the Swiss Minister at Washington, called the treaty to the attention of the American Department of State and asked the extension to Swiss products of the reductions to France, that department at first held that the claim was not well founded, since the agreement with France was a reciprocity agreement and not within the operation of the most-favoured-nation clause. But when M. Pioda called attention, in his reply, to the minutes of the negotiators as to the intent of the parties at the time the treaty was made, the United States recognised that the treaty had been intended to be unconditional and extended the favours to Switzerland.¹ But at the same time it was announced that it was to be considered as an exception to the American practice, and steps were immediately taken to terminate the treaty.

ATTEMPTS TO AVOID EFFECTS OF THE CLAUSE

In order to be able to confer a favour upon certain selected districts or persons, or respecting certain particular objects, without extending it to all States with which the favouring nation has treaties containing most-

¹ MOORE, *op. cit.*, 283; Tariff Commission, 428; HORNBECK, *op. cit.*, 33; VINER, *op. cit.*, 120.

favoured-nation clauses, resort sometimes is had to conditions or limitations imposed upon the favour, which those whom it is designed to benefit will meet but which will exclude all others. These conditions or restrictions may be divided into three classes: (1) those which it is necessary to meet under any interpretation of the clause; (2) those which it is necessary to meet under a conditional, but not under an unconditional, interpretation of the clause; (3) those which it is unnecessary to meet under any interpretation or form of the clause.

1. The conditions or restrictions which must be met under any form of the clause are conditions inherent in the clause which describe the favour and limit it—which, in a word, set forth the nature of the favour. M. de Visscher has clearly shown the nature of this class of conditions:¹

“D’abord, il peut arriver que la condition ne se rapporte qu’à l’intérêt favorisé et que son accomplissement soit donc nécessaire pour faire naître cet intérêt . . . Comme exemple de (cette) forme de la condition, citons le cas où, par un traité, les droits d’entrée sur certains produits destinés à l’exportation d’un des contractants sont abaissés, à la condition que les marchandises soient importées directement du pays d’origine . . . L’objet qu’on veut favoriser dans le premier cas consiste dans les marchandises satisfaisant à la condition d’importation directe; c’est seulement par l’accomplissement de cette condition que l’objet reçoit toute la portée exigée par la convention. Or, si un autre Etat, s’appuyant sur la clause de la nation la plus favorisée, veut réclamer des privilèges pareils, il ne pourra les acquérir que pour des intérêts de la même portée . . . Aucune question de traitement inégal ne peut se présenter, parce que, de cette manière, des intérêts égaux sont traités d’une façon identique. Donc les tarifs les plus bas ne peuvent être réclamés en vertu de la clause de la nation la plus favorisée que dans le cas où les marchandises sont aussi importées directement.”

A great number of such conditions might be cited, but they are obvious. The minute classifications of objects in tariff schedules in order to discriminate without violating the most-favoured-nation clause all use conditions of this kind. The imposition of one rate of duty on black oils and another and heavier one on yellow oils² is the imposition of such a condition. On its face there is no discrimination; all nations are treated equally, and the only requisite for the lower duty is that the oil be black. One must know that all Russian oils are black and that most American oils yellow to get the true purpose of the provision. The classic example of such a condition is Item 103 of the German Tariff of 1902,³ which provided a very low special rate on

¹ DE VISSCHER, *op. cit.*, 159.

² France imposed this duty in 1889; the United States protested, but nothing was ever done about it. (*Foreign Relations U. S.*, 1890, pages 287-292.)

³ Tariff Commission, *op. cit.*, 483; CULBERTSON, *op. cit.*, 789.

"large dappled mountain cattle reared at a spot at least 300 meters above sea-level, and which have at least one month's grazing each year at a spot at least 800 meters above sea-level . . . Brown cattle are those breeds which . . . belonging to the long-headed variety, especially to the races of Alpine cattle . . . have a silver-grey to dark or very dark-brown hide, with lead-coloured muzzle, bordered with very light brown, almost white; black hoofs and horn tips, and dark tail tuft." This admitted cattle from Switzerland and the Austrian Tyrol, while effectually shutting out French, Belgian, Dutch, Danish and Russian cattle. Yet, so far as language goes, the favour is open to all nations. This is obviously a very efficient method of discriminating.

2. The conditions which need not be performed under the unconditional, but which must be met under the conditional, form of the clause are conditions which are independent of the favour itself, and are attached to its operation, rather than to the favour itself. They are usually conditions precedent to such operation. M. de Visscher defines them:¹

"D'un autre côté, il est également possible que la condition soit tout à fait séparée de l'intérêt lui-même et ne se rapporte qu'à une chose quelconque que la nation favorisée doit faire ou ne pas faire. Dans ce cas, l'intérêt auquel, par la convention, on a voulu accorder un traitement favorisé est indépendant de l'accomplissement de la condition et ne découle pas de cet accomplissement."

These conditions, to state the matter shortly, are those which set forth the consideration. They are usually promises of reciprocal favours, or equivalent favours, or the cession of territory. They might even consist of the payment of money. They are the conditions intended to be covered by the regular American conditional clause.

3. The third class is separated from the other two only by the line between what is reasonable and what is unreasonable. Collateral or inherent conditions which are perfectly proper shade off imperceptibly into restrictions and descriptions which are, without question, in violation of the spirit of the clause and usually in violation of its letter. From the example we have given—"black oils"—it is not very far to "goods imported by railway,"² and "salt from a country which imposes no duty on salt,"³ to duties on "products from countries whose tariff schedule the President deems unreasonable;"⁴ and from there one can go on, with perfect theoretical consistency, to "duties from countries south of the equator," "duties from countries whose mother-

¹ DE VISSCHER, *op. cit.*, 159.

² DE VISSCHER, *op. cit.*, 160.

³ U. S. A. Act of August 27th, 1894, paragraph 608, *Free List: Tariff Commission, op. cit.*, 428.

⁴ U. S. A. Tariff Act of 1890, Section 3. *Tariff Commission, op. cit.*, 421; CULBERTSON, *op. cit.*, 76.

tongue is a Romance language," or "to monarchies whose rulers have blue eyes." In exactly the same manner, the collateral conditions may make the consideration for the extension of a favour the compliance with any sort of condition, so that in the end we may arrive at the same absurd conclusion—a condition "that the monarch of the country have blue eyes." The line between these unreasonable restrictions and the first two classes is therefore the line of reasonableness—the test for negligence and due process of law—which gives the widest possible latitude for interpretation of each set of facts.

The legislating power may practically interpret such a clause as it wishes. What is "reasonable" depends upon its own judgment, unless by some treaty the proper interpretation be submitted to arbitration or determination by an international court.

There are five kinds of attempts to avoid the clause: (1) the use of geographical discriminations; (2) the imposition of countervailing duties; (3) the imposition of penalty duties; (4) the minute classification of articles in tariff schedules; (5) the use of prohibitions of articles on sanitary grounds. The first three are all justified on the ground that they are uniformly applied to all nations—the so-called "rule of uniformity"; there is no objection to the last two so long as they are reasonable. When, however, they are clearly unreasonable and are really only cloaks to discrimination in fact, the correct interpretation ought to be submitted by both parties to arbitration or judicial determination.

The rule of uniformity is an abstraction or generalisation from the rule announcing the purpose of the most-favoured-nation clause. The most-favoured-nation clause is to be considered as an entity, according to this rule, and its purpose is to prevent discrimination. If there is no discrimination, there is no violation of the rule. If the provision applies equally to all nations, there is no discrimination. Therefore, if the terms of the provision complained of are applicable to all nations equally, there is no violation of the clause, even though it is certain that only a few nations will be able to meet the requirements. In other words, it is similar to the American contention that the clause secures equality of opportunity, and not equality of treatment.

(a) "Geographical" discrimination is expressed by clauses providing, for instance, that products from certain regions, or ships coming from or going to certain districts, shall pay different rates than other products, or ships going to or coming from other regions. There is no mention in such clauses of any nation or country, but the clause, by its very terms, will be applicable only to one or a small number of nations. The controversy between the United States and Norway, in 1828, over a discrimination in the tonnage tax imposed by the latter on vessels coming from European ports on the Mediterranean, and on those coming from other European ports from those coming from ports not European, furnishes an example of such an effort to avoid the effect of the most-favoured-nation clause. (See *United States Foreign*

Relations, 1887, pp. 1038-1053.) A similar discrimination was embodied in the United States Navigation Act of 1884, imposing a tonnage tax on vessels; those coming from certain ports, comprising those of North America and the northern part of South America, paying a different rate from those coming from other ports. This was the subject of protest on the part of a number of States having treaties with the United States containing "most-favoured-nation" clauses. (See *United States Foreign Relations*, 1886-88.)

In the course of the correspondence between Germany and the United States over this treaty, M. Alvensleben, the Minister at Washington, wrote:

"It cannot be doubted, it is true, that, on grounds of a purely local character, certain treaty stipulations between two Powers, or certain advantages automatically granted, may be claimed of third States not upon the ground of a most-favoured-nation clause. Among these are included facilities in reciprocal trade on the border, between States whose territories adjoin each other. It is, however, not to be doubted that the international practice is that such facilities, not coming within the scope of a most-favoured-nation clause, are not admissible save within very restricted zones . . . This law (of 1884) grants definite advantages to entire countries, among others to those situated at great distances from the United States; these advantages are, beyond doubt, equivalent to facilities granted to the trade and navigation of those countries, even if they do, under certain circumstances, inure to the benefit of individual vessels of foreign nations. It scarcely need be insisted upon that these advantages favour the entire commerce of the countries specially designated in the act, since they are now able to ship their goods to the United States on terms that have been artificially rendered more favourable than those on which other countries, not thus favoured, are able to ship theirs."

There was a long and inconclusive correspondence over the matter, but in 1886 a new law was enacted by the Congress of the United States giving all countries which had as low rates of duty the benefit of the lower rates, with the provision that the nations favoured in the first act would be presumed to have such low rates, while other nations must show it.

(b) Another form of discrimination sought to be justified, under the rule of uniformity, or under a conditional interpretation of the clause, is the countervailing duty.

Certain countries adopted the system of paying bonuses to encourage particular industries, first to stimulate production, and, secondly, to enable the products to be sold in foreign markets in successful competition with domestic products in those markets. The arguments advanced for the compatibility of the countervailing duties with the most-favoured-nation clause may be thus summed up: If the products to which the bounties apply were to be admitted without special duty, they would be receiving treatment

more favourable than that accorded to other nations, which is not permissible. Therefore the countervailing duties are levied not to discriminate but to prevent discrimination—to equalise the treatment granted to all similar products. It is fairly conclusive that the favoured-nation article gives either of the two contracting Powers the right to complain of an export bounty by the other contracting Power on the grounds that such form of protection affects the value of similar engagements with other Powers. But, on the other hand, the argument was not even “fairly conclusive” to any other Power except Germany. The best statement of the arguments against the countervailing duties is found in the opinion of Secretary of State Gresham when the American Act of 1890 levying countervailing duties was in question; he said that the clause gave either party “the right, special engagements of reciprocity being excepted, to take the duties levied by the other on articles the product or manufacture of any other country, and to demand the same treatment for its own products or manufactures. It is obviously no answer to this to say that certain discriminating duties levied by one party on the products or manufacture of the other are not confined to the latter or to any other country by name, but apply equally to all countries that may happen to fall in a certain category. If there is any other country, or if there are other countries, which, either by name or by a general classification, are exempt from the duty (special engagements of reciprocity being excepted) the requirements of the treaty are not fulfilled. To say that the discrimination is not specifically and explicitly national, or that it applies to more than one country, is a mere argumentative subterfuge, inconsistent with the clear intention of the treaty.”

Countervailing duties would seem, by the weight of authority, to be against the principle of most-favoured-nation treatment, but there appears to be an overbearing necessity for something of the kind to stop “dumping.” Consequently, it is generally allowed that countervailing duties are permissible, even though they are in technical violation of the clause, if they are used justly and as a matter of necessity. The arguments advanced to sustain the practice in general are merely *ex necessitate*. Probably a sounder argument than any other would be that, where a higher duty is imposed upon goods coming from a country which pays bounties for their production than upon the products of other countries, instead of a discrimination contrary to the treaty provision, the countervailing duty is a means of protecting against such discrimination. But this argument is sound only when such a duty is actually necessary to equalise conditions. (See CULBERTSON, 73-76.)

(c) Another method of avoidance is by the imposition of sanitary prohibitions. It is admitted universally as a principle that imports of articles or substances which would be dangerous to the health or welfare of the people may be prohibited on sanitary grounds. Examples of such prohibitions are the quarantines imposed on immigrants from countries where epidemics are raging; the quarantine on cattle from districts where there is foot-and-mouth

disease; the prohibition on the importation of Japanese silkworms, because they carry a dangerous parasite; the prohibition of the importation of opium. These are all examples of justified prohibitions, such as no nation would claim to be in violation of her most-favoured-nation clause. However, this rule offers a very efficient way of discriminating. For instance, from 1880 to 1890, Germany, France, and, to a lesser extent, the rest of Continental Europe, imposed prohibitions on the importation of American pork, ostensibly because the American pork was infected with trichinæ and had been causing trichinosis in Germany. It was proved, however, that the American pork was carefully inspected, and was, in fact, free from disease, and that the trichinosis was caused by German-grown pork. The legislation was the result of the agitation by the agrarian interests for protection against American pork. High protective tariffs would not meet the case, for the cattle trade was international within Europe. The provisions referred to effectually excluded American competition without bringing the case within the most-favoured-nation clause in existing treaties. There never has been any dispute as to the legal effects of such provisions; it has never been doubted that a nation might impose sanitary embargoes. But it would seem that in the interests of international amity some restrictions ought to be placed on nations in this respect so as to avoid wanton discrimination, and a rule of reasonableness should be developed through the Court of International Justice.

The immediate effect of the Great War was to abrogate all treaties between any of the Allied with any of the Central Powers which contained the most-favoured-nation clause, and the Russian revolution destroyed all treaties of the imperial régime.

The Economic Conference held at Paris in 1916 adopted the following recommendation:

"Whereas the war has put an end to all treaties of commerce between the Allies and the enemy Powers, and it is of essential importance that during the period of economic reconstruction the liberty of none of the Allies should be hampered by any claim put forward by the enemy Powers to most-favoured-nation treatment, the Allies agree that the benefit of this treatment will not be granted to those Powers during a number of years to be fixed by mutual agreement among themselves."

In all the Peace treaties, the Central Powers promised unconditional most-favoured-nation treatment, *unilaterally*, for five years to each of the Allied Powers. (See *Treaty of Versailles*, Article 267; *Treaty of St. Germain*, Article 220.)

A similar provision was inserted in treaties between the Allied and Associated Powers and the new States of Central and Eastern Europe; for example, the treaties with Poland contain the following clause:

"Poland also undertakes to extend to all the allied and associated States any favours or privileges in Customs matters which she may grant during the same period of five years to any State with whom, since August 1914, the Allies have been at war, or to any State which may have concluded with Austria special Customs arrangements as provided for in the Treaty of Peace to be concluded with Austria."

The same spirit after the war was manifested by a very strong reaction against the co-operative spirit of the war. Strong nationalistic feeling developed, which was translated in the economic field into a sort of revival of mercantilism. Each nation sought to exclude the goods of the others and develop its own industries—or, rather, get them back on their feet. France and Italy raised very high tariff barriers, and even England, with her supposedly free trade policy, began to levy some duties. Since it was obviously desirable in some instances to lower tariffs for special considerations, these policies required freedom from restraint, and the most-favoured-nation clause was in the way. Consequently, France, in 1918, denounced all her commercial treaties containing the most-favoured-nation clause, but she later reconsidered and retained them in force, subject, however, to a three months' notice. Italy denounced her treaties with France, Greece, Japan, Roumania, Russia, Serbia, Spain and Switzerland. Roumania denounced all her treaties; so did Bulgaria, though she had few left to denounce. Greece denounced those with Great Britain, Norway, Spain, Switzerland, and the United States; Spain her treaties with Denmark, the Netherlands, Norway, Sweden and Switzerland. In England there was a strong sentiment in favour of abandoning the most-favoured-nation clause—in fact, Mr. Bonar Law announced in Parliament in 1918 that the treaties would be denounced. But nothing was done. Even in the United States the same spirit was manifested by Section 5 of the Merchant Marine Act (the Jones Act) of 1920, which directed the President to abrogate all the clauses in treaties which would prevent the United States from discriminating in favour of its own vessels against those of other Powers. No action, however, has been taken pursuant to this resolution.

But the nations do not seem able to escape the use of the clause. When the Balkan States and the States formed by the dismemberment of Austria-Hungary wished to settle their commercial problems on a "common-sense" basis, they turned from the elaborate arrangements under which they had been working to the most-favoured-nation clause. Germany has been granted by two of the Great Powers—Great Britain and the United States—promises of most-favoured-nation treatment, and France, Italy and Japan have been negotiating with her for the conclusion of most-favoured-nation agreements with them. France, although she denounced her treaties, has not abandoned them, and they practically all are still in effect. Great Britain, as stated, did not abrogate any of her treaties. So the general result seems to be that

the most-favoured-nation clause is winning its way back to the position of regulator of international commercial relations. Not only has a reaction in favour of the most-favoured-nation clause set in in Europe, but the United States has abandoned its policy of more than a century of adhering to the conditional form and of giving a conditional construction to even the unconditional forms of the clause. The Tariff Commission, in 1919, recommended that the wisest and best policy for the United States was one of complete equality in the treatment of all nations. Congress adopted that policy in the Tariff Act of 1922, and this now may be said to be the settled policy of the United States. The first public evidence of this new policy appeared in the exchange of notes with Brazil dated October 18th, 1923, in which the two countries agreed to accord each other "unconditional most-favoured-nation treatment." (See CULBERTSON: *International Economic Policies*, pages 92-93.)

The Commercial Treaty between the United States and Germany ratified on February 10th, 1925, when before the Committee on Foreign Relations, was declared to be a model for subsequent commercial treaties.

The phraseology of the most-favoured-nation clause contained in Article VII of that treaty is as follows:

"Each of the high contracting parties binds itself unconditionally to impose no other or higher duties or conditions and no prohibition on the importation of any article the growth, produce, or manufacture of the territories of the other than are or shall be imposed on the importation of any like article the growth, produce, or manufacture of any other foreign country.

"Each of the high contracting parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other high contracting party than are imposed on goods exported to any other foreign country.

"Any advantage of whatsoever kind which either high contracting party may extend to any article the growth, produce or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article the growth, produce or manufacture of the other high contracting party.

"With respect to the amount and collection of duties on imports and exports of every kind, each of the two high contracting parties binds itself to give to the nationals, vessels, and goods of the other the advantage of every favour, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, and regardless of whether such favoured States shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treat-

ment. Every such favour, privilege or immunity which shall hereafter be granted the nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation be extended to the other high contracting party for the benefit of itself, its nationals and vessels."

The change was deliberately adopted as making American commercial practice square, in fact, with the theory of "the open door," upon which its policy is based. (See CULBERTSON, pages 94-95; 20 *American Journal of International Law*, January, 1926, Supp., pages 4-7.)

There are certain expressed reservations from its operation contained in the same article of the above-quoted treaty. These read as follows:

"The stipulations of this article shall apply to the importation of goods into and the exportation of goods from all areas within the German Customs lines, but shall not extend to the treatment which either contracting party shall accord to purely border traffic within a zone not exceeding ten miles (15 kilometers) wide on either side of its Customs frontier, or to the treatment which is accorded by the United States to the commerce of Cuba under the provisions of the Commercial Convention concluded by the United States and Cuba on December 11th, 1902, or any other commercial convention which hereafter may be concluded by the United States with Cuba, or to the commerce of the United States with any of its dependencies and the Panama Canal zone under existing or future laws."

Article VIII of the same treaty contains provisions for reciprocal *national* treatment with regard to internal taxes, transit duties, charges in respect to warehousing, and other facilities and the amount of drawbacks and bounties; and Article IX reciprocal equality conditions as to duties of tonnage, harbour, pilotage, quarantine or other similar or corresponding duties or charges, however described. The whole treaty is a model of exact statement as to the extent and limit of most-favoured-nation treatment and as to reciprocal national treatment, and might well serve as a model for future commercial treaties between other States.

The foregoing sketch of the history of the most-favoured-nation clause would seem to answer the question submitted for the consideration of this Sub-Committee. The Great War broke the thread of continuity in the history of the clause. The experience of the various States since the war has shown the necessity of the continued use of the provision. Nations continue to trade with each other.

The rule of reciprocity has proved its value. The pre-war history has demonstrated that in this field, as in every other realm of contract-making, the parties should clearly express their meaning. The sponge of war relations

has been passed over the old forms and the different interpretations they gave rise to. A new era of treaty-making has followed.

Whether the principle of the open door be universally accepted or not, there can be no excuse for not making clear the intention of the parties to the contracts. If questions arise as to their interpretation, the application of the judicial process by one of the Hague tribunals should be sought to furnish an authoritative interpretation. It would not seem either necessary or desirable even if it were practicable to endeavour to frame a code provision to govern the case. The ordinary rules of judicial interpretation would seem adequate and more desirable.

(Signed) WICKERSHAM,
Rapporteur.

ANNEX 2

OBSERVATIONS BY PROFESSOR BARBOSA DE MAGALHÃES

(Extract from Minutes of the Tenth Meeting, March 28th, 1927.)

Professor BARBOSA DE MAGALHÃES stated that, as he had received Mr. Wickersham's admirable report only a few days before leaving for Geneva, he had not had time to set his observations down in writing. He would therefore submit them orally.

In the first place, he pointed out the great interest and importance—both economic and legal—of the question.

The most-favoured-nation clause covered a very wide area as regards the extent to which it was employed and the scope of its application.

All countries had made general use of it before the war, but the war led to a breach of continuity. Since then it had been realised that the idea of international economic solidarity, advocated in the thirteenth of President Wilson's Fourteen Points and contemplated in Article 23 (e) of the Covenant of the League of Nations, would have to be abandoned. The clause, which had fallen into disfavour, had again gradually found general acceptance, and all countries, including even France, which had avoided its use as much as possible, had employed it; and, notwithstanding adverse criticism and the dangers and surprises the clause might involve, it was now used more widely than before the war.

The reason, no doubt, was that when certain countries decided to resort to this clause the others were compelled to follow if they were to avoid, as a result of its automatic application, heavy loss and prevent a complete change in a position which they had secured, it might be, with great difficulty and in return for the grant of important favours.

With regard to its application, the speaker stated that it extended not only to Customs questions but also to questions of transit, navigation, the status of foreign merchants, the rights of consuls and other international agents, the question of literary and industrial property, the status of emigrants, etc. It

was therefore to be found not only in commercial treaties but also in treaties of an economic nature.

As a result, the clause assumed the most varied forms. It might be more or less general in extent; it might involve greater or lesser restrictions, or it might contain no restrictions at all. It might be conditional or unconditional, etc.

In his report, Mr. Wickersham gave them various examples and supplied them with highly interesting data. But it was also true that, while this might perhaps be the first occasion on which there had been close investigation of the possibility of reaching an international agreement on the principal ways of determining and interpreting the effects of the clause—and the speaker welcomed this initiative on the part of the Committee—the subject had been carefully studied both by economists and jurists. Among the most recent investigations reference might be made, since it was specially legal in character, to that carried out by Baron Nolde in the courses at the Hague Academy of International Law, published in the Collection of Lectures (1924, II).

M. Nolde endeavoured to determine the sphere of operation of the clause both in time and space. He took up various problems and gave the solutions which he favoured, basing his opinion both on legal practice and the principles of law.

In the first place, should the clause cover favours granted to third parties prior to the Convention, as well as favours subsequent to the conclusion of the Convention? Should the equality of rights have the same period of duration as the clause itself? Did the favours granted subsist or fall with the conventions concluded with third parties? What were the third parties whose rights were included in the clause? Should it cover all foreign States, including their dominions and protectorates, with the exception of those with which the contracting party had concluded a Customs union? Did it follow that colonies could not be regarded as third parties from the point of view of the application of the clause?

The speaker was of opinion that all these questions should be answered in the affirmative, but it was important to note that the differences of opinion in regard to these replies or solutions were not very great.

A further question arose. In the absence of a clear and explicit stipulation, should the clause be regarded as conditional or unconditional? Obviously it could and should be laid down that it was unconditional, and therefore that, in the absence of an explicit stipulation it would confer the benefit of all reductions and specifications which had been obtained, or which might subsequently be obtained, by third States from the other contracting party.

He would merely give a few examples of questions which, in his opinion, might be regulated by means of a general international convention.

The rules in question regarding the interpretation and application of the most-favoured-nation clause would be supplementary rules, *i.e.*, they would

only be applied in the absence of a text or if the text was not clear and explicit.

They would not restrict the freedom of States; in other words, by considering the States as contracting parties, they would not impair the principle of their autonomy.

He accordingly believed that it was not only desirable but possible to reach international agreement in regard to these rules, and he saw no legal, and more particularly no political, obstacles in the way.

These rules, which should, of course, be framed in conformity with the principles of law and of legal interpretation and in harmony with settled practice, would prove very useful to economic interests. It was also certain that these problems of the interpretation and application of the clauses in commercial and economic treaties were deeply engaging the attention of economists.

It would be seen that, in connection with the preparatory work for the forthcoming International Economic Conference, the Trade Barriers Committee of the International Chamber of Commerce, after noting that "the majority of National Committees are favourable to a single tariff, with duties subject to reduction by negotiation, with the widest possible application of the most-favoured-nation clause" and that almost all countries have taken the most-favoured-nation clause as the basis of their commercial policy, accompanying it by tariff agreements which are only seldom restricted to certain categories of goods, recommended the creation under the aegis of the League of Nations of an organisation which was mentioned in Article 22 of the Convention relating to the Simplification of Customs Formalities, and Article 7 of the Draft Convention for the Abolition of Import and Export Prohibitions, an organisation which would, *inter alia*, be called upon to adjudicate on differences arising from conflicting interpretations of the treaties.

The speaker considered that it would be better to lay down certain general rules for the interpretation and application of the most-favoured-nation clause which, being purely of a supplementary character and devoid of any binding force as regards the use of the clause, its application, its form or its scope, would be of great value for the guidance of States by determining the interpretation, meaning, scope and application of the clause when it was not clearly expressed.

The conclusion of Mr. Wickersham's report was that "it would not seem either necessary or desirable, even if it were practicable, to endeavour to frame a code of provisions to govern the case. The ordinary rules of judicial interpretation would seem adequate and more desirable." The speaker, however, could not find in the report any justification for this conclusion, and on the contrary considered that the ordinary rules of judicial interpretation did not suffice to prevent disputes between contracting States; that it was desirable to frame supplementary provisions in a general international convention, and that, as there were no insuperable obstacles, it was possible

to do so. He therefore proposed that the subject should not be dropped and that they should ask the opinion of the Governments.

Only then could it be decided with a full knowledge of the facts whether or not an international agreement on the principal ways of determining and interpreting the effects of the most-favoured-nation clause was realisable.

(In reply to arguments submitted by other members of the Committee, Professor Barbosa de Magalhães added the following.)

Professor BARBOSA DE MAGALHÃES pointed out that the rules which he believed could be framed would not be of a binding character, but supplementary. They would be rules to assist in the interpretation and application of the clause. For that reason he saw no very serious difficulties in the way of their acceptance by States.

At the same time, the utility of such rules was obvious.

It might be said that the Parties concerned should clearly express their intention; but it might happen, and indeed it would often happen, that they did not do so. Provision must be made in international law, as in municipal law, for cases in which there was no stipulation in the text, and for cases in which the text was not clear and precise. Rules to remedy this defect would be even more useful in international than in municipal law, since it was less easy to resort to a judicial procedure to settle doubts and disputes.

Before recourse could be had to international tribunals or even to arbitration, this method would have to be provided by treaty or the two parties would have to agree.

He therefore continued to think that the subject was such as to allow of the regulation by an international convention of at least certain problems, and that it ought to be submitted to Governments, either with a draft convention or a questionnaire.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS

Adopted by the Committee at its Third Session, held in March-April 1927

RECOGNITION OF THE LEGAL PERSONALITY OF FOREIGN COMMERCIAL CORPORATIONS*

The Committee of Experts for the Progressive Codification of International Law was required under its terms of reference:

- (1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
- (2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and,
- (3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In execution of these terms of reference, the Committee requested a Sub-Committee:

“To examine, with a view to regulation by international agreement, the question of the recognition of the legal personality of foreign commercial corporations.”

The Sub-Committee, which was composed of M. RUNDSTEIN, Rapporteur, and M. M. GUERRERO and SCHÜCKING, submitted to the Committee a report setting out the reasons in support of its conclusion that the subject is one the regulation of which by international agreement is at the present moment desirable and realisable.

M. Schücking has submitted observations on the subject of this report, to which M. Rundstein has replied.

The report, with the observations and the reply, has been examined by the Committee of Experts.

The nature of the general question and of the particular questions involved therein appears from the report. The latter contains a statement of principles to be applied and of the solutions of particular questions which follow from these principles. The Committee regards this statement as indicating the questions to be resolved in order to deal with the matter by way of an international agreement. All these questions are subordinate to the larger question set out above.

* Publications of the League of Nations. V. Legal. 1927. V. 11.

The Committee is informed that this subject has just been placed on the agenda of the Conferences on International Private Law which the Government of the Netherlands proposes to convene, and that a questionnaire dealing with it has already been sent to a certain number of Governments.

Considering, in consequence, that, if the Government of the Netherlands proceeds in the near future to follow up this initiative, which it has taken since the last session of the Committee, submission of the subject to the Governments in accordance with the Assembly's resolution of September 22nd, 1924, might be regarded as superfluous, the Committee has resolved to transmit its Sub-Committee's report to the Council, with an expression of the opinion of the Committee that the subject, within the limits indicated by the report, is one which it is desirable and presently realisable to regulate by international agreement, either in the manner contemplated by the Government of the Netherlands or, if this initiative remains without effect in the near future, in such other manner as the Council may deem appropriate.

The Committee feels it desirable to add that it does not pronounce either for or against solutions proposed for special problems by the Sub-Committee. At the present stage of its work, it is not for the Committee to put forward conclusions of this nature. Its task is rather that of directing attention to certain subjects of international law the regulation of which by international agreement appears to be desirable and realisable.

The report of the Sub-Committee, with the observations and remarks bearing on it, is attached to the present communication.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: M. RUNDSTEIN.

Members: M. GUERRERO.

M. SCHÜCKING.

"Is it possible to establish, by way of a convention, international rules concerning the recognition of the legal personality of foreign commercial corporations?"

[Translation]

Having had the honour to be appointed Rapporteur of the Sub-Committee which was directed to examine the question stated above, I must observe, at the outset, that there is a very intimate connection between the problem of recognition, as it is generally conceived, and the question of nationality (eighth question).

For, the very moment one speaks of the recognition of "foreign" commercial corporations, one raises, in so doing, the crucial and really characteristic point of the problem by emphasising the fundamental distinction between bodies which are styled "foreign" and those which are styled "national" corporations. In point of fact, "recognition" implies "legal existence." No such question could be raised in the legislation of any country in respect of corporations constituted under its own laws, since the fact of the corporation having been constituted connotes its recognition. No international tribunal can be competent to decide a question which could not even be raised before a purely national tribunal. Unless we define the distinctive characteristics of the so-called "foreign" corporations, we cannot approach the solution of the problem of *recognition*, since the latter question possesses no importance from an international point of view, except in relation to foreign corporations.

Having said this, I must also point out that the problem raised in the questionnaire concerning the recognition of the *legal personality* of foreign commercial corporations is stated in rather restrictive terms. It may appear at first sight that the recognition of commercial corporations which are *not invested* with a legal personality is a question unsuited for international settlement. But would such corporations not be able to act outside the country in which they were constituted, and would they not require recognition in order to enjoy certain legal rights, even if they were not subjects of law in the strict sense of the term?

Even if they are not invested with a distinct and independent personality, they are nevertheless regarded as entities, capable of exercising certain rights and subject to certain obligations of a collective nature (for instance, the capacity to sue or be sued), without any confusion arising thereby between collective capacity and individual rights and obligations. It would be in conflict with the principle of respect for established rights to argue that a commercial corporation which does not possess legal personality is incapable of receiving recognition outside the frontiers of the country in which its seat is situated.

We have already pointed out in our report on the question of nationality that the criterion of nationality or non-nationality cannot be applied to corporations which are not so constituted as to possess a legal personality; we proposed that States which were willing to have the question of nationality settled by a uniform method should be allowed to make an express declaration to the effect that the terms of the convention should not apply to corporations having no legal personality. Even if the idea of such a reservation should find acceptance, it would still be without influence on the question of recognition. If, therefore, in the case presumed by the above reservation, the State in question attached particular importance to the nationality of the partners, *quid* partners, in such an association, that would not affect the question of the recognition of the corporation in its relations

with foreign countries. We should not be concerned, in such a case, with the recognition of a legal personality but with the recognition of certain clearly defined obligations and rights, resulting from a contract governed by the laws of another country; the existence and the legal consequences of such a contract would have to be determined according to the provisions of those laws, subject to the necessary reservations in regard to public law (see POULLET, *Manuel de droit international privé belge*, 1925, page 219). Moreover, it should be noted that when commercial treaties deal with the recognition and legal existence of commercial societies they make no distinction between those which are endowed and those which are not endowed with a legal personality. Such treaties usually say: "Joint-stock companies and other commercial societies . . . shall be recognised" (or else "shall have their legal existence recognized") without any distinction being drawn in regard to the characteristics of these "other" societies.

We therefore hold that, quite apart from the recognition of the legal personality of commercial corporations, it would be possible to regulate the wider question of their international existence, leaving out of consideration the legal character bestowed upon them by the competent territorial legislation.

It is true that general international law contains as yet no written rule on this question of recognition; but practice and jurisprudence alike tend to uphold the general principle stated above, even if there are no explicit rules on the subject. As is known, a clause for the recognition of corporations has become "common form" in commercial treaties. But even where there is no special clause of that nature it is generally accepted that a foreign corporation, which is regularly constituted and conforms to the laws of the country where it has its centre of management and control, is to be regarded as existing when, in consequence of its activities, the courts of some other country are seized of a question concerning it for which they are competent. The relevant clauses of the commercial treaties cannot be construed as setting forth a legal principle which had no previous existence, since these clauses are declaratory rather than creative of new law. By rehearsing and explicitly affirming an already existing rule, the contracting parties renounce their right to abrogate it by unilateral action. It would be inconceivable that the tacit acceptance of a rule, sanctioned by use and even regarded as one of the understandings of customary international law should absolutely prevail over the sovereignty of the individual State. The legislation of the country must always remain free to vary the rule; it may make recognition dependent upon a previous (general or special) authorisation, or it may make it subject to reciprocity.

It is sometimes stated that recognition is accepted in practice as a *customary rule* (see BAR, ASSER). Other authorities have regarded this alleged customary right as a phantasm (LAURENT). We prefer an intermediate opinion, expressed by MAMELOK (*Die juristische Person im internationalen*

Privatrecht, 1900), who, after making an ingenious distinction between "gemeines Recht" and "gemeinsames Recht," argues for the existence of the customary law, except in so far as it may be expressly restricted by the laws of the country (pages 35 and 36). It therefore appears highly desirable that the above-mentioned rule, prescribing general recognition, should be explicitly confirmed by a multilateral convention, which would overrule special laws on the subject and would sweep away the complicated system of general or special authorisations.

Even in countries in which the recognition of certain foreign corporations is made subject to previous authorisation—it will have been noticed that the exceptions are more frequent than the rule—recognition was affirmed by means of unilateral declarations or of special conventions; similarly, regard must be paid to the working of most-favoured-nation clauses. As a fact, even if the absence of an authorisation for certain classes of corporations were to entail non-recognition (as under the French law of May 30th, 1857), the non-recognition of foreign corporations would not connote their non-existence in law. For instance, it has been agreed that such a corporation though non-existent, is liable to be sued, even if it is refused the right to appear as a plaintiff.

Such a system is really very far removed from the notion of non-existence; for instance, French jurisprudence, while describing unrecognised corporations as corporations *de facto*, admits that they may sue as plaintiffs in cross-actions. Such an attitude is clearly inconsistent; if it is true that an unrecognised corporation has no existence, that doctrine should hold good in all cases, and the distinction between the status of the corporation as an active and as a passive party to a suit is utterly artificial (see PILLET, *Traité II*, page 816). The non-recognition which results from the absence of authorisation must be regarded rather as a prohibition restraining such corporations from engaging in business in the country. But this non-recognition does not imply that they do not exist in law; that would be in conflict with the principle of respect for established rights; and although, in the absence of recognition, a foreign commercial corporation may not be authorised to engage in the regular activities for which it was constituted, it nevertheless exists as a legal personality (PILLET, *Traité II*, pages 817 and 818). It would therefore be inconsistent to refuse it the capacity to sue or be sued, or, for instance, the capacity to defend rights which it has acquired in its country of origin and which have to be maintained before the foreign Court. Or, again, how could such a corporation be declared incapable of purchasing raw materials in foreign countries for use in its country of origin? And who would contend that it was *non-existent* if it sought to defend rights arising out of contracts concluded with its purveyors in foreign countries?

We must therefore recognise foreign corporations as subjects of law and—if they do not possess legal personality in virtue of the laws under which they

were constituted and the laws of the country in which they have their seats—we must conclude that the special rights which are inherent in their existence (*e.g.*, the independent right of a corporation to bring an action), and the rights of certain preferential creditors (see LEVEN, *loc. cit.*, pages 298–299) must be respected. Recognition in this sense does not imply that the corporation is entitled to engage in the normal operations which are the object and the chief purpose of its existence. Recognition does not imply that the corporations will necessarily enjoy such rights, since this must depend entirely on the conditions which may be laid down by the national laws—a point which cannot be fittingly examined here; it merely implies that they will be qualified and able to have such rights granted to them (see CUV, *loc. cit.*, page 18). It would be a mistake and incorrect to suppose that the procedure of recognition implies the *creation, afresh*, of a legal personality; on the contrary, it is the mere affirmation of an existence which has already been established by the competent laws in the other country. That is the fundamental difference between civil “status” and business activities (“civil capacity” and “functional capacity”)—a difference of which we must never lose sight. From the point of view of recognition, it is the existence of the company which is of primary importance; the refusal to admit that a foreign corporation has any general right to exercise its normal activities merely amounts to declaring that there are certain established rights which a corporation may enjoy, though these rights are, as a rule, of a very limited nature.

Recognition therefore implies that the corporation, though not explicitly or tacitly authorised to engage in the activities contemplated by its articles of association, must be regarded as possessing a general capacity, in virtue of which it is entitled to defend its rights. These rights may arise from operations which are contemplated by the articles of association and which are pursued in the country of origin, though the other party to the contract or engagement may reside abroad. Supposing that the company should find itself compelled to defend its rights of this character before a foreign court, it would be unable to institute any legal proceedings if it were regarded by the *lex fori* as non-existent. The same situation may arise where a corporation takes certain disconnected steps in a foreign country, so long as these steps are not such as to reveal an intention of engaging therein in continuous operations of the kind which the corporation was mainly formed to pursue (for instance, purchase of raw materials, loans raised abroad, etc.). These operations, which are known in American practice as “incidental acts,” can have no legal effect unless it is admitted that the foreign corporation has an existence in law. If this postulate were rejected, the situation of parties to contracts might be very precarious and hardly consistent with the interests of the country in which the foreign corporation in question was the active or passive subject of such “incidental acts.” Let us suppose that an insurance company which is registered in country A and which is not

allowed to engage in regular operations in country B placed an order in the latter country for the printing of forms and policies. Could it be argued that, if the contract were not carried out, the recognition of this company in country B would be inconsistent with the vital interests of that country? And could the foreign company be denied protection on the ground that, as it had no existence in law, it could not bring an action? The Turin Cour de Cassation very justly emphasised the chief issue of this problem when it declared (judgment of November 18th, 1882): "*L'ammettere i corpi morali esteri a godere dei diritti civili non vuol dire ammetterli ad esercitare la loro funzione ed a spiegare l'attività del proprio organismo, e, in altri termini, ad impiantare il loro istituto in Italia.*"

We find, however, that some reservations are made in regard to foreign corporations which cannot be recognised because they are constituted in a manner inimical to public order. Such reservations are sometimes drawn as follows in commercial treaties:

"Civil and commercial companies (or limited liability and other companies) which are validly constituted under the laws of one of the contracting parties and have their seat in its territory shall be recognised as existing in law in the territory of the other party *provided that they do not pursue objects which are illegal or contrary to public morals.*"

We are of opinion that there is no need for such a reservation in an international arrangement. It has its uses in connection with the *admissibility* of commercial corporations, since admission could not be granted to a foreign corporation pursuing an illegal object (*e.g.*, a company formed to trade in tobacco could not be admitted to a country in which there is a tobacco monopoly) or an object which is contrary to public morals (*e.g.*, a joint-stock company formed to organise gaming houses could not be granted a concession in countries where such houses are forbidden).

Mere recognition, however, scarcely concerns the exercise of the normal functions of a foreign corporation in a country other than that in which it was constituted and has its registered office. If a corporation was validly constituted in a given country, its existence could not be contested in foreign countries on the ground that its statutory object and its various activities were inconsistent with certain prohibitory clauses of the local laws. The exception would be comprehensible if the statutory object of a foreign corporation was inconsistent with prohibitions which are recognised by common international law (*e.g.*, companies formed for slave trade or for privateering); however, it is very unlikely that any such companies would be formed. In actual fact no corporation is illegal if it has once been validly constituted under the competent laws; one can only speak, strictly, of *illegal operations* where such a corporation is pursuing its business outside its country of origin. Let us suppose, for example, that a country A, in which gaming houses are absolutely prohibited, declares that it recognises the

existence of a foreign joint-stock company formed for gaming purposes. Now, does such recognition imply that an action for the recovery of a gambling debt would be receivable by the courts of country A? The reply must evidently be in the negative. There seems, however, no necessity to assert that such a company would have to be regarded as *non-existent*, assuming that its incidental activities in country A were not in themselves illegal or contrary to good morals. Supposing that such a company placed an order for furniture for its premises situated outside the frontiers of country A, the purveyors would be in a very precarious situation if the courts of their own country had declared that the claim for payment was not receivable because the company was non-existent. Such a situation might arise if a foreign vintners' company ordered bottles or casks for its products from a dealer domiciled in the United States. MICHOUX has very justly observed (Vol. II, page 351): "A Swiss company formed to trade in tobacco should be regarded in France as possessing full capacity, though actually unable to carry on there the trade for which it is constituted; for instance, it could validly effect a transaction in tobacco with the French State and could uphold its rights in a court of law."

Attempts have been made to draw distinctions by differentiating between objects which are *absolutely* and those which are *relatively* prohibited, but I do not think that such a distinction would be of use for the purpose of a general codification. These are rather questions to be decided by doctrine and jurisprudence.

The general principle of recognition ought not therefore to be limited by reservations concerning the *objects* of foreign corporations, since the only problem at issue is that of their existence and this problem is not connected with the activities in which they may be engaged.

In order that foreign corporations may secure recognition, they must, of course, be validly constituted, in conformity with the law by which they are governed. If they are commercial corporations in the eyes of that law, but the law of the country of recognition places them in a different category and regards them as civil corporations (although they possess a commercial form, as, for instance, a joint-stock company formed for the purchase and re-sale of immovable property), the distinction is still of no great importance. The legal consequences of the operations of such corporations may, indeed, be affected if they are regarded as commercial in one country and as civil in another (powers, bankruptcy, etc.); the distinction therefore affects the admission of such corporations to engage in business but not their recognition pure and simple. As regards the latter point, it would be their personal status which would determine the question of their existence, and the legal consequences of their intrinsic character (*i.e.*, whether civil or commercial corporations) would only come into play in connection with activities undertaken in the territory in question. The *lex loci* would be entitled to consider

a given activity as commercial, although, from the point of view of personal status, the corporation might be solely of a civil character. But these questions do not affect the issue of recognition.

Similarly, it is not necessary, in order that a foreign corporation should be recognised, that it should fulfil all the conditions to which the *lex loci* subjects the acquisition of personal status or the capacity to enjoy certain rights. The legal characteristics of a foreign corporation may differ profoundly from the form recognised by the local legislation; for instance, the *lex loci* may not recognise the form of a company with limited liability, though this form is admitted by the law under which the company in question was constituted. This question is of the highest importance when considering the admission of such companies to carry on business in a territory other than that in which they were constituted; but it does not give rise to any difficulties in connection with the recognition of their legal personality, since such recognition does not connote a right to engage in their normal business or to be entered in the commercial registers. The question of branches founded by foreign companies of types which are unknown to the legislation of a given country lies outside the ambit of this report; it is regulated by practice, and occasionally by domestic legislation (see paragraph 3 of Article 230 of the Italian Commercial Code, and paragraph 2 of Article 238 of the Roumanian Commercial Code) and it is difficult to believe that any uniform settlement of this question could be arrived at in the near future, having regard to the profound differences between the laws on this subject.

Provisions for a uniform settlement of the question of recognition might take the following form:

1

Commercial companies validly constituted under the law of one of the Contracting States and having their actual seat in that State shall, as of right, be recognised as such in the other Contracting States.

2

Foreign companies which possess legal personality under the relevant law of one of the Contracting States shall also possess such personality in relation to the other Contracting States.

3

Foreign companies which the law does not recognise as distinct entities shall, in the territory of the other Contracting States, enjoy the same legal status as is granted them under the relevant law of their own country.

Such companies cannot claim more favourable treatment at law in the country which recognises them, even if they fulfil all the conditions which entitle companies of that country to the benefit of legal personality.

4

Foreign companies which are thus recognised shall be capable of exercising civil rights and of being parties to actions at law, either as plaintiffs or defendants, in the territories of the signatory States, provided they comply with the laws of the country in question.

5

Recognition of commercial companies belonging to a Contracting State does not imply that these companies shall be entitled to establish themselves and transact business in the territory of the other Contracting Parties or, in general, to carry on permanently the activities contemplated by their statutes.

Warsaw, October 7th, 1926.

(Signed) S. RUNDSTEIN,
Rapporteur.

TEXT OF THE PROVISIONS MODIFIED AS THE RESULT OF THE COMMITTEE'S
DISCUSSION

1

Commercial companies validly constituted under the law of one of the Contracting States and having their actual seat in that State shall, as of right, be recognised as such by the other Contracting States.

2

Foreign commercial companies belonging to one of the Contracting States and possessing legal personality therein shall also possess such personality in relation to the other Contracting States.

3

Foreign commercial companies to which the law does not accord legal personality shall, in the territory of the other Contracting States, enjoy the same legal status as is granted them under the relevant law of their own country.

Such companies cannot claim more favourable treatment at law in the country which recognises them, even if they fulfil all the conditions which entitle companies of that country to the benefit of legal personality.

4

Foreign commercial companies thus recognised shall, in the territories of the signatory States, be entitled to enjoy the rights resulting from such recognition and be parties to actions at law either as plaintiffs or defendants, provided they comply with the laws of the country in question.

Recognition of foreign commercial companies belonging to a Contracting State does not imply that these companies shall be entitled to establish themselves and transact business in the territory of the other Contracting Parties or, in general, to carry on permanently the activities contemplated by their statutes.

OBSERVATIONS BY M. SCHÜCKING WITH REGARD TO M. RUNDSTEIN'S REPORT
[Translation]

I have no general observations to offer with regard to the report on question 9: "Is it possible to establish by way of a Convention international rules concerning the recognition of the legal personality of foreign commercial corporations?" I agree with the opinion set out in this excellent report.

I would venture, however, to refer to what is more or less a question of form in connection with Articles 4 and 5 of the draft.

Article 4 defines the rights which are implied in the "recognition" of a foreign company by a State signatory to the Convention, whereas Article 5 specifies the domain in which a foreign Company should *not* be granted recognition by the foreign State which has signed the Convention, without special authorisation based on an administrative act or a bilateral or plurilateral treaty. The Convention thus defines the maximum and minimum rights of foreign legal entities engaged in commerce and defines them with perfect clearness. The only objections I have to raise are in connection with the phrase: "exercer . . . les droits civils et ester en justice" which M. Rundstein employs in Article 4 of the draft. The expression "droits civils" is certainly clear in French legal parlance, where it is not open to any misinterpretation. (See PILLET: "Des personnes morales en droit international privé," pages 217 *et seq.*)

This is not the case, unfortunately, in German legal phraseology, which gives to "bürgerliche Rechte" a meaning quite different from that which the rapporteur has in view. "Bürgerliche Rechte" are, in German doctrine, opposed to "politische Rechte," and they include all the non-political objective rights which, as law, come within the domain of public law. They therefore include rights which touch upon social questions, as, for instance, the right of industrial freedom, which according to this conception is a "bürgerliches Recht."

This is contrary to the standpoint adopted in the report, and particularly to Article 5 of the draft.

The rapporteur is quite justified in holding that the recognition of a foreign company should have no further effect than to allow it to exercise certain rights and accomplish certain acts in relation to its capacity to enjoy such rights (*Rechtsfähigkeit*) and its capacity to be a party to an action at law. These, then, are, in their essence, rights which, as law, come within the

domain of private law, that is to say, above all, the capacity of enjoying a right (*Rechtsfähigkeit*), and consequently all the powers which follow as a result of such capacity—for instance, the capacity to conclude a contract (*Vertragsfähigkeit*). To express the meaning of the second phrase (capacity of being parties to an action at law), German legal parlance employs two terms which have originated in the German Code of Civil Procedure and Doctrine regarding actions at law ("*Parteifähigkeit*" and "*Prozessfähigkeit*").

"*Parteifähigkeit*" is the capacity to be, either directly or indirectly, party to an action at law (GAUPP-STEIN: "*Zivilprozessordnung*," 5th edition, Vol. 1, page 132). "*Prozessfähigkeit*" is the capacity to appear in Court, the capacity to declare one's intention on one's own behalf or on behalf of others (GAUPP-STEIN, *op. cit.*, page 139). A minor, for instance, is "*parteifähig*," for he may, either directly or indirectly, be party to an action at law; but he is not "*prozessfähig*," because he cannot express his intention.

"*Prozessfähigkeit*" is largely a doctrinal consideration when applied to juridical personality. Those who hold that legal entities are a fiction do not admit that such entities can be "*prozessfähig*," but those who support the theory of their real existence (organic theory) admit such "*prozessfähigkeit*."

In entire agreement with this German doctrine, WALKER ("*Internationales Privatrecht*," 4th edition, pages 133 *et seq.*) says: "Den ausländischen juristischen Personen muss grundsätzlich die Parteifähigkeit zugestanden werden, die Fähigkeit vor Gericht als Kläger oder Beklagter aufzutreten . . . Die Frage, ob juristischen Personen Handlungsfähigkeit und damit Prozessfähigkeit zuzuerkennen sei, hat fast nur für die Rechtslehre Bedeutung." The same opinion is expressed by MAMELOK in a very judicious manner ("*Die juristische Person im internationalen Recht*," page 97): "Geschäfte einer juristischen Person, die sie im Ausland geschlossen hat, behalten, wenn sie sich nicht auf den eigentlichen Gegenstand ihrer Operationen beziehen, ihre Gültigkeit und Klagbarkeit. . . ."

To express, therefore, in German legal phraseology the thought which the rapporteur had in mind when he wrote "*droits civils*" and "*ester en justice*," we should say that the question is one of the capacity to enjoy rights (*Rechtsfähigkeit*), which implies "*Parteifähigkeit*" in actions at law.

If, on the other hand, we admit the organic theory regarding legal entities, we should refer to "*Prozessfähigkeit*," though I would not venture to suggest that the terms of German legal phraseology, which are clear and which satisfactorily define the scope and essence of the "*droits civils*" and the "*capacité d'ester en justice*," should be translated and included in the text of a convention which could hardly be couched in such technical terms; I have ventured to point out that the conceptions "*droits civils*" and "*ester en justice*" are open to contradictory interpretations as soon as they cease to be employed in the strict sense of French legal phraseology.

(Signed) SCHÜCKING.

COMMENTS ON M. SCHÜCKING'S REMARKS

[*Translation.*]

Professor Schücking raises perfectly legitimate doubts as to the meaning of the expression: "exercer . . . les droits civils et ester en justice . . ." in Article 4 of the draft. The equivalent of this expression in German, "bürgerliche Rechte," might cause confusion and might be interpreted in a manner which would be contrary to the real signification of the clause.

I venture to offer the following comments:

My intention was to emphasise the fact that recognised corporations would be capable of enjoying rights; they were to be considered therefore from the point of view of their *civil personality*, as distinct from the question of their *capacity to transact business* (see PILLET, *Traité II*, page 818). M. Pillet has thoughtfully drawn attention to the difficulties caused to legal terminology by the peculiar use of "capacité" in French legal parlance (cf. PILLET, "Des personnes morales en droit international privé," 1914, No. 62, note 3: "The use of the word 'capacité' in this connection might easily cause misunderstanding. On this point German terminology is better and more adequate than our own, for the Germans distinguish two sorts of 'capacité': 'Rechtsfähigkeit' and the 'Handlungsfähigkeit'" (see also FRANKENSTEIN, "Internationales Privatrecht," 1926, I, page 399, note 52: "Wenn Pillet zwischen 'capacité de jouissance' und 'capacité d'exercice' unterscheidet, so ist das nur eine freie Uebersetzung der deutschen Begriffe, keine dem französischen Recht geläufige Terminologie").

It is the outstanding difference which Anglo-American terminology endeavours to convey by contrasting "civil capacity" with "functional capacity."

From a terminological point of view, it is very interesting to compare the German and French texts of Article 54 of the Swiss Civil Code:

German text.

Die juristischen Personen sind handlungsfähig sobald die nach Gesetz und Statuten hierfür unentbehrlichen Organe bestellt sind.

French text.

Les personnes morales ont l'exercice des droits civils dès qu'elles possèdent les organes que la loi et les statuts exigent à cet effet.

I note that, in the treaties of commerce recently concluded by the German Reich, this conception has been expressed as follows:

"Aktiengesellschaften und andere kommerzielle, industrielle oder finanzielle Gesellschaften, einschliesslich der Versicherungsgesellschaften, welche in dem Gebiete des einen vertragsschliessenden Teiles ihren Sitz haben und nach dessen Gesetzen zu Recht bestehen, sollen auch in den Gebieten des anderen vertragsschliessenden Teiles als zu Recht bestehend anerkannt werden und gegen Beobachtung der daselbst geltenden einschlägigen Gesetze und Verordnungen befugt sein, alle

ihre Rechte geltend zu machen und namentlich vor Gericht als Kläger oder Beklagter Prozesse zu führen" (see MARBURG, "Staatsangehörigkeit und feindlicher Charakter juristischer Personen," 1927, page 35).

It will be sufficient, then, to mention "rights" ("*ihre Rechte geltend zu machen*") without the qualifying adjective "civil."

Similarly, a draft statute on legal entities drawn up by the International Chamber of Commerce is worded as follows:

"Shareholders' companies (joint-stock companies) and other associations, commercial, industrial and financial, or transport or insurance associations, domiciled in the territories of one of the contracting parties—provided they have been validly incorporated therein in accordance with the municipal law—shall be recognised in the territories of the other Contracting Parties as possessing a juridical personality and as being entitled, provided they conform to the law of the countries in question, to exercise *all their rights*, including the right of being parties to actions at law either as plaintiffs or defendants."

(See the Report of the Trade Barriers Committee, submitted to the Preparatory Committee of the Economic Conference of the League of Nations.)

Therefore, in view of Professor Schücking's observation, Article 4 of the Draft might be worded as follows:

"Foreign companies thus recognised shall, in the territories of the signatory States, be entitled to enjoy the rights deriving from such recognition and be parties to actions at law either as plaintiffs or defendants, provided they comply with the laws of the country in question."

Geneva, March 21st, 1927.

(Signed) S. RUNDSTEIN.

LEAGUE OF NATIONS

Committee of Experts for the Progressive Codification of International Law

REPORT TO THE COUNCIL OF THE LEAGUE OF NATIONS

Adopted by the Committee at its Third Session, held in March-April, 1927

NATIONALITY OF COMMERCIAL CORPORATIONS AND THEIR DIPLOMATIC PROTECTION*

The Committee of Experts for the Progressive Codification of International Law was required under its terms of reference:

1. To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
2. After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
3. To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.

In Execution of these terms of reference, the Committee requested a Sub-Committee:

"To examine, with a view to regulation by international agreement, the questions of the nationality of commercial corporations and of the determination of the State to which the right of affording them diplomatic protection belongs."

The Sub-Committee, which was composed of M. RUNDSTEIN, Rapporteur, and MM. GUERRERO and SCHÜCKING, submitted to the Committee a report setting out the reasons in support of its conclusion that the subject is one the regulation of which by international agreement is at the present moment desirable and realisable.

M. Schücking has submitted observations on the subject of this report, to which M. Rundstein has replied.

The report, with the observations and the reply, has been examined by the Committee of Experts.

The nature of the general question and of the particular questions involved therein appears from the report. The latter contains a statement of principles to be applied and of the solutions of particular questions which follow from these principles. The Committee regards this statement as indicating the questions to be resolved in order to deal with the matter by way of an

* Publications of the League of Nations. V. Legal. 1927. V. 12.

international agreement. All these questions are subordinate to the larger question set out above.

The Committee is informed that this subject has just been placed on the agenda of the Conferences on International Private Law which the Government of the Netherlands proposes to convene, and that a questionnaire dealing with it has already been sent to a certain number of Governments.

Considering, in consequence, that, if the Government of the Netherlands proceeds in the near future to follow up this initiative, which it has taken since the last session of the Committee, submission of the subject to the Governments in accordance with the Assembly's resolution of September 22nd, 1924, might be regarded as superfluous, the Committee has resolved to transmit its Sub-Committee's report to the Council, with an expression of the opinion of the Committee that the subject, within the limits indicated by the report, is one which it is desirable and presently realisable to regulate by international agreement, either in the manner contemplated by the Government of the Netherlands or, if this initiative remains without effect in the near future, in such other manner as the Council may deem appropriate.

The Committee feels it desirable to add that it does not pronounce either for or against solutions proposed for special problems by the Sub-Committee. At the present stage of its work, it is not for the Committee to put forward conclusions of this nature. Its task is rather that of directing attention to certain subjects of international law the regulation of which by international agreement appears to be desirable and realisable.

The report of the Sub-Committee, with the observations and remarks bearing on it, is attached to the present communication.

Geneva, April 2nd, 1927.

(Signed) HJ. L. HAMMARSKJÖLD,
Chairman of the Committee of Experts.

ANNEX

REPORT OF THE SUB-COMMITTEE

Rapporteur: M. RUNDSTEIN.

Members: M. GUERRERO.

M. SCHÜCKING.

"Is it possible, without encountering political or economic obstacles, to formulate by way of a convention international rules concerning the nationality of commercial corporations and the determination of the question to what State the right of affording them diplomatic protection belongs?"

[Translation.]

I. THE METHOD

The solution of this problem involves an examination of certain preliminary questions connected with the analysis of the political and economic obstacles

which would be met with in the preparation of a convention requiring the contracting States to consider a commercial corporation as national or otherwise.

It is obvious that the external form taken by the activities of commercial corporations does not always reflect the actual political and economic position: a corporation established under the legislation of a country A may have a majority of shareholders who are nationals of a country B, may be constituted with the aid of foreign capital, and may be largely influenced by persons over whom country A has no control. Joint-stock companies cannot be confined within territorial boundaries; frontiers have no meaning for them. It would seem that the States which eventually sign a convention would lose all power of determining the legal capacity of such corporations, even if their activities were held to be injurious to the trade and industry of the country. If a corporation is national in virtue of an international rule, it cannot be treated in a manner incompatible with the legislation of the country; any discrimination would amount to a violation of international engagements.

If, then, a certain association must be recognised as having the inalienable character of a "national corporation," it cannot legally be treated otherwise, even if its activities, its influence, its personal composition, and its management, all imply that it is "foreign." States are, of course, free to conclude conventions dealing with the recognition and establishment of corporations; they frequently enter into commercial treaties which contain clauses dealing with the legal status of corporations. These international undertakings, however, being bilateral and founded on mutual concessions, have no general character. Moreover, they operate on the basis of the conception of "nationality" as if it were a fixed and recognised standard. They have nothing to say as to the conditions in which a corporation constituted in one of the two contracting States is to be considered national but allow full play to the rules of the local law. Their object is rather to lay down rules for the recognition of corporations, the granting to them of authority to engage in trade or industry, their taxation, etc., in the territory of the contracting parties. The terms employed and the clauses embodying these rules are almost invariable, apart from a few slight differences to meet special circumstances, and it seems likely that the habitual use of these uniform clauses may lead to the formation of a general law.

All this, however, is far from constituting the establishment of rules for the legal determination of nationality with which the law of individual countries would have in all cases strictly to comply.

At this juncture it may be well to allude to the political and economic situation which has developed out of the Great War. The guiding principles which were followed before the war in determining the nationality of corporations were laid down by the legislation and jurisprudence of that period. Where the system of Government licences, which removed all doubt as to the nationality of corporations, was not in use, the system of domicile (seat—

siège social) was generally employed. Although there was formerly a tendency to make nationality dependent on the location of the centre of activity (centre of operations), this theory has of late years found little support. The legislations of many countries were at one in recognising the interdependence of the law of constitution and the seat (*siège social*) of the corporation. It cannot, however, be said that this practice created a strict customary rule of international law governing the determination of the nationality of corporations. It would be going too far to imagine that in the pre-war period the power of the State in regard to determination of the nationality of a corporation necessarily depended on the official and actual seat of the corporation as the sole point of connection with the territory. There was no such customary rule. At the most, we might say that there was a generally recognised rule for the determination of nationality; but this rule could not be erected into a regular international law (MAMELOK, *Die Staatsangehörigkeit der juristischen Personen*, 1918, p. 16: "Es handelt sich hier um allgemeines, nicht aber um seiner Quelle nach gemeines Recht"). And if we can accept the general principle that the attribution of legal capacity to a corporate body is decisive of the question of its nationality, this rule is purely one of interpretation. It is applicable in case of doubt, but is not sanctioned by any international custom (NEUMEYER, in *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*, Vol. 2, 1919, p. 155).

What changes in these conceptions were brought about by the war?

There is no need to rehearse the vicissitudes of emergency legislation and of the practice of courts which broke with pre-war tradition. The legal personality of corporations was called in question because their abstract unity was no longer the only point considered. The nationality of the members was substituted for the nationality of the corporation; enquiries were made into the individual activities which were cloaked by the distinct legal entity constituted by the persons responsible for the corporation's existence and work. The view was taken that a corporation, being an association of individuals, necessarily reflects the activities of those individuals. Recourse was had to the conception of serving as a cloak for individual activities and an attempt was made to justify *ad hoc* ways of looking at the matter on the ground of a difference between the conceptions of private and public law. While the principle was recognised that a corporation is an entity distinct from and independent of the personalities of its members, and that their nationality cannot be identified with the nationality of the association, the dictates of public law were followed and the standards of private law were thereby rendered inoperative and of no legal effect. In short, it was assumed that "derrière la fiction du droit privé se dissimule vivante et agissante la personnalité ennemie elle-même" (Paris Court, February 27th, 1917; CLUNET, 1917, page 1457), and it was established by public-law methods that a corporation which had previously been regarded as national was foreign. By this procedure, a conception until then unknown and foreign to

the prevalent notions—the English conception of “control” as the distinctive mark of nationality—was introduced.

It would not carry us far to describe the theories briefly outlined above as pathological. That would give no indication of their vitality and the possibility of their application in the future, even if their value is negative. What was pathological yesterday may be normal tomorrow. Admitting that post-war legislation and jurisprudence are returning to traditional conceptions, we may nevertheless reasonably ask whether the theories constructed on the basis of war measures will be without influence on the development of the idea of nationality in the immediate future—if, indeed, they did not destroy that idea by introducing standards irreconcilable with the views hitherto accepted. This is the principal point on which economic obstacles (which are in themselves political obstacles) might destroy an international settlement by making it impracticable or even undesirable. Modern authorities are not blind to the possibility that war experience may have some effect on the legislation and jurisprudence of the future.

Accordingly it may be admitted that present circumstances do not encourage the idea of a general settlement which would bind States and deprive them of the freedom of action demanded by their economic needs. Already, of course, there may be seen in French and English jurisprudence a tendency to revert to the old principles (the practice of certain joint arbitral tribunals in regard to the nationality of corporations continues to be influenced by the provisions of the Peace Treaties; they refuse to accept the idea of nationality at all, and work on the basis of the “control” theory, without prejudice to the question of principle as to the standard to be employed in normal circumstances). French post-war jurisprudence adheres to traditional conceptions, admitting that “la nationalité d’une société, pas plus que celle d’un individu, ne se détermine également ni par ses affinités ni par ses tendances; elle est en principe celle du pays où la société a été constituée et à la législation duquel elle a conformé ses statuts” (decisions of the Paris Court, December 17th, 1919; and Court of Cassation, July 28th, 1919). A similar change of front may be observed in English jurisprudence: the decision of the House of Lords in the well-known case of *Daimler Co. v. Continental Tyre and Rubber Co.* (June 30th, 1916) was adapted to war-time needs, but since the war there has been a return to the principles generally accepted in time of peace, and as early as 1919 we find the following instruction in Section 2 of the Treaty of Peace Order of that year:

“The expression ‘nationals’ in relation to any State includes . . . a company or corporation incorporated therein according to the law of that State.”

But does this abandonment of the principles generally accepted during the war mean that countries are ready to accept uniform principles based on the conceptions current before the war? Will they be prepared to tie their hands

and make their legislation conform to the principles of international law on the subject of nationality?

The answer depends on the view taken of the importance and scope of the rules to be formulated in order to establish a universal definition of the nationality of legal persons.

If this definition could be so formulated as not to restrict the freedom of action of States—enabling them, on the contrary, to control as they might think fit the constitution of commercial corporations working under the protection of their laws—the reply would be in the affirmative. If, on the other hand, the settlement to be proposed contained any indication that it would encroach upon the legislative freedom of States, it is very doubtful whether the task of codification could be attempted or accomplished.

Owing to the protectionist tendency of territorial legislation, we find very serious obstacles to the free constitution of commercial corporations, particularly in countries where susceptibilities exist as to the origin of the capital, the control which may in fact be exercised over what is *prima facie* a national company, the importance of the industry in which a company is engaged, or the nature of the company itself if subject to special regulations (*e.g.*, companies of general importance for the national economy or connected with national defence; measures relating to key industries). There has been much discussion of the possibility of *reconciling* the different criteria of nationality in order that the pre-war conceptions and the new idea of “control” may be combined so as to cover both peace-time and war-time eventualities (Cuq, *La nationalité des sociétés*, 1921, p. 11; LEVEN, *De la nationalité des sociétés et du régime des sociétés étrangères en France*, 1926, pp. 123 *et seq.*). M. LYON-CAEN, in his preface to M. LEVEN’s monograph, observes that such a reconciliation would appear difficult to accept.

I share that view, and I hold that it would be wrong to accept criteria reconciling opposing conceptions; that would affect the development of international relations and co-operation between peoples. When we pay regard to the trend of national economic forces and the special needs of States, we are not neglecting the international point of view according to which economic activity is impossible without national interdependence. One of two courses must be chosen: either there must be a return to pre-war principles with the modifications required by the imperative needs of the present time or preference must be given to a notion of “control” introduced by emergency war legislation which makes “nationality” dependent upon interpretations of fact and exercise of discretionary powers in a manner that cannot easily be brought into a uniform system; in the latter case, that security, which is so necessary in international relations, could not be guaranteed.

This new notion of “control” cannot be taken as a “standard” in an international settlement of the question. It would not be worth while to formulate as a rule so elastic and ambiguous a conception, for it would be the negation of a definite rule, inasmuch as the contracting States would be left

complete freedom to apply it as they chose; moreover, the theory in question would amount to an absolute denial of the legal personality of commercial corporations, because it would remove the need for applying the principle of nationality.

On the assumption, then, that an international settlement can be made upon the basis of the maintenance of the principles established by pre-war practice, it must be emphasised that the recognition of those principles, being of a strictly *formal* nature, cannot restrict the freedom of States to protect their own vital economic interests. Mention has already been made of this fundamental condition, without which no international settlement would be feasible, and we therefore propose to indicate the lines which any future convention must follow if the work for an international settlement is not to fail.

Let us suppose that a rule is laid down for determining the nationality of commercial corporations. In any event the rule must be silent as to the conditions to be imposed by the local legislation on the constitution of a corporation. In other words, the international settlement will not affect the methods which the legislators in each country may think it necessary to follow in order to determine whether a corporation can be constituted, registered, licensed, and attached by this or that necessary qualification to the local legislation from which it derives its existence and consequently its so-called "nationality." All that can be done by an international settlement is to lay down that *if* the corporation is constituted the distinctive marks of its nationality are to be found in the legal qualifications which it will formulate. Thus, domestic legislation is free to say: "The constitution of commercial corporations is not subject to any restriction as regards the nationality of their members; the corporation is national even if all the shareholders or all the capital are foreign, provided that it is constituted in accordance with the local law and that its official seat (*siège social*) is its actual and genuine central office." Or, on the other hand: "In order to be a national and connect itself with the local law, the corporation must observe special regulations; it could not be constituted, and would have only a *de facto* existence, if the conditions stipulated for the purpose of preventing foreign control or predominance were not observed." Consequently, the local law is free to insist that the shares shall be registered and that only a certain proportion—even a very small proportion—may be held by foreigners; or that the direction and management of the corporation must be such as to guarantee the possibility of an effective influence being exercised by nationals of the country on the policy of the company. In the case of corporations of general importance, regulations may be made to prevent foreign control. Further, the local law may exclude the principle of free constitution of joint-stock companies and may make the formation of certain classes of company conditional upon Government authorisation. The forms taken by these restrictions need not be analysed here; they are to be found in the legislation of many countries (Great Britain, Sweden, Switzerland, French projects,

etc.). They are not in principle subject to any restrictions, except so far as considerations of interdependence and co-operation, or the unfortunate consequences likely to ensue from measures of retortion on the part of other countries, may counsel a wise moderation. Nevertheless, such restrictions do not violate any customary principle of international law, for it is not a question of a general prohibition excluding all foreigners from participation in any company constituted in accordance with the local law. Moreover, commercial treaties prevent the application of such an anti-alien principle.

At the same time, whatever these restrictions may be, however comprehensive and rigorous, they can have no influence on the international settlement of the nationality question; provided that it is understood that that settlement must give way to the conditions already established and fixed by local legislation. These *material* conditions are to be respected by a formal settlement which will refer to the criterion of the constitution of the corporation and assume that it conforms with the local law. Similarly, the inherent dangers of a conception so difficult to grasp as that of "control" are avoided. This is the method which has long been used in commercial treaties; the provisions dealing with the recognition of corporations make it conditional upon their being duly constituted in conformity with the laws in force and domiciled in the territory of the contracting parties; what those laws may be, and to what conditions the choice of domicile may be subject, is a matter which does not concern the general principle.

It would therefore be undesirable—indeed, harmful—to enact rules for the nationality of corporations embodying uniform essential conditions to be incorporated in all legislations. The attitude adopted in the Convention of October 13th, 1919, relating to the regulation of aerial navigation is not to be recommended in a Convention designed to crystallise the ordinary law governing commercial corporations in general. In Article 7 the Convention deprives the States concerned of their absolute freedom to determine the nationality of incorporated companies owning aircraft. The conditions which the local laws should immediately prescribe in order that such companies may be nationals are specified in the Convention itself. This method may suit the special case of aerial navigation but cannot be generally applied; the risks would be too great.

Having selected our method, we must now proceed to enquire into the principal question—whether, and if so how, the conception of the "nationality" of companies can be made the object of an international settlement.

II. THE PROBLEM

We should be exceeding the scope of this report if we attempted to discuss the theoretical controversies that arise on the main question whether the idea of nationality can apply to corporate bodies in general, and more particularly to commercial companies having the status of legal entities with an independent personality. The term is now in general use in international

conventions, laws, jurisprudence, and works on the subject. But the fact that it is so used does not prove that the conception in question reflects the actual state of things; for in point of fact there is a considerable difference between the nationality of natural persons and the nationality of legal entities with independent personality. When we enquire into the theories now current, we find that, apart from those which accept the identity of the conception of nationality as applied to natural persons and to legal persons (see, for example, ISAY, *Die Staatsangehörigkeit der juristischen Personen*, 1907, p. 67), the following views are held:

1. In favour of the application of the conception *by analogy*. The conception as generally applied to natural persons is transferred with the *modifications* entailed by the difference in the character of companies and associations. In establishing a legal relation between an association created under private law and a particular State, the association is said to have a definite nationality, in order to show that of all the legislations of different countries it is the legislation of the country specified that should govern the contract of association and the legal relations which derive from it.

2. Against the idea of nationality as applied to legal persons. This view hardly depends on the interpretation placed on legal personality. Whether the "fiction" system (LAURENT) or the system which derives the rights of corporate bodies from the rights of the individual members (VAREILLES-SOMMIÈRES) is accepted, it is boldly stated that a corporate body can have no nationality, "car elle n'est qu'un procédé intellectuel, qu'une image de notre cerveau; seuls, les associés ont une nationalité" (VAREILLES-SOMMIÈRES). Even where the real existence of corporate bodies is admitted and the "fiction" theory discarded, the idea of nationality is rejected as a useless and even dangerous conception. There is a considerable difference between the nationality of persons and the nationality of associations. PILLET (*Traité pratique de droit international privé*, Vol. II, pp. 770 *et seq.*) argues that the analogy generally accepted is purely theoretical in this connection; the attribution of nationality to legal persons is regarded as artificial (MARTIN-ACHARD, *La nationalité des sociétés anonymes*, 1918, pp. 34 *et seq.*). What is called the nationality of corporations is really nothing more than a kind of domicile. We do not propose to enter into an analysis of this negative theory as to the alleged nationality of corporations; we would merely point out that the acceptance of the conception of domicile in this connection involves the acceptance of the theory of *jus soli* as a general criterion to determine the relation between the State and the association, which will necessarily be subject to the State to which it owes its existence. MICHOD (La *théorie de la personnalité morale*, 1924, Vol. II, p. 344) has very reasonably pointed out that for corporate bodies domicile and nationality are one and the same thing.

Whatever views may be taken by legislators and writers on law, we think it is useful to keep the idea of nationality as a convenient conception to express certain solutions which admittedly have their advantages.

As a matter of fact, when a conflict of laws arises out of the legal status of a corporation, we have to consider in the first place whether the corporation is foreign or national; its status is a complex of rights and obligations derived from a specific source and governing the functions and activities of the legal entity. These rights and obligations are not distinct and disparate legal phenomena; the unity of the legal situation is unalterable, even if in actual fact we find separate legal acts varying with the country in which they are constituted or performed. With this unity, certain *vested interests* are bound up, which must be protected even outside the limits of the sovereignty of the State to which the legal entity belongs. The limits of this protection may vary (clause concerning public order and the exclusive application of the local law). Nevertheless, the attitude of the competent legislator, when called upon to settle questions of law connected with the existence and functions of legal entities, will always be influenced by this problem: to what sovereignty is the status of any given corporate body subject?

Here the main difference is clearly brought out. Are we concerned with the status which is constituted by the complex of obligations and rights which is subject to the sovereignty of our own State, or of some other State? What are the distinctive marks and points of connection by which such status can be attached to a *foreign* State belonging to the community of nations? (Even in the best of worlds the members of that community are not limited to two, but are very numerous.)

It will be seen that we are not here confronted by a simple question of the applicability of laws. Moreover, it might be contended that every legal relation bears the characteristic impress of nationality. Should a contract of sale, concluded between two Englishmen domiciled in France and to be carried out in France, be regarded as a contract having "French nationality"? Such an interpretation cannot be admitted. NEUMEYER (*Internationales Verwaltungsrecht*, Vol. I, pp. 107, 108) points out that this could not be the true meaning of the conception of nationality as applied to corporate bodies; it would be a mere application of SAVIGNY's theory of the location of the legal relations in question (CUQ, *op. cit.*, page 50: "Mais peut-on traiter la nationalité comme un effet du contrat de société?"). The attachment of a corporate body to the sovereignty of a certain State is not a final solution of a problem of conflicts of laws but a starting-point from which to attack special questions. Can a company belonging to a country A and operating in a country B be held to possess the nationality of the latter country on the ground that certain legal relations, which in no way concern the territory or inhabitants of A, arise and take place in B?

The individual legislations of different countries certainly contain no special provisions dealing expressly with acquisition, change, and loss of nationality by corporate bodies on the analogy of the corresponding rules for natural persons. Indeed, it is extremely doubtful whether such rules are needed. While nationality, in the case of natural persons, is the presumption of

certain relations involving legal consequences, and while it is also the condition of certain rights and obligations attaching to the persons concerned, the position in regard to corporate bodies is different. Obviously, the law governing the nationality of natural persons does not apply to commercial corporations; for their origins and functions differ profoundly. Certain rights and obligations can only apply to natural persons, in regard to whom independent rules may be laid down to determine the principle underlying the inevitable consequences of the main conception (*e.g.*, civil rights and duties). In the case of corporate bodies, on the other hand, the core of the problem resides in the character of the legal effects which must be accepted, assuming the transference to those bodies of the points of connection already recognised as existing in the case of natural persons. Thus a national may acquire immovable property which foreigners are not permitted to acquire, or only subject to certain conditions (Government authorisation). If certain commercial corporations are entitled to acquire immovable property while others are not, the differentiation may be based on the assumption that corporations of the latter class are *foreign*; by elimination, therefore, all other corporations are *national*, and there is no need for special legislation on the point of nationality.

The conception of nationality is formed by this method of contrasting legal consequences; in order to be recognised as a person having legal capacity, to be allowed to carry on trade or industry and acquire immovable property, to have free and ready access to the courts of law, to be exempt from the *cautio judicatum solvi*, to be subject to taxation on the normal scale and to enjoy diplomatic protection, an association must satisfy certain conditions. These are not analogous to the assumptions which might be invoked as the *causa efficiens* of the nationality of natural persons (birth, marriage, legitimation, naturalisation): they are bound up with the origin of the association; associations constituted in accordance with the legislation of a particular country by the possession of a distinctive mark (seat, main establishment, etc.) will be recognised as "national." If these conditions are not satisfied, the association may be entirely without any legal *existence* (unless otherwise provided, of course, in international agreements or in the local legislation). In such cases the expression "corporations under the jurisdiction of foreign powers" (*sociétés ressortissantes de puissances étrangères*) is used. The conceptions commonly attached to the nationality of natural persons have been introduced by the methods of general transference and individual contrast. We proceed by the method of contrast if we specify the points of attachment of foreign corporations (*cf.*, for example, Article 28 of the Spanish Civil Code, which lays down that associations shall possess Spanish nationality in virtue of recognition by the law of the country of domicile, and also specifies that associations domiciled abroad are in a different position). It would be useless, however, to make special rules for nationality, since the legal recognition of corporations is not

regulated with that sole object. Indeed, the question of nationality is dealt with incidentally; it is not premises but effects that are regulated. For example, while the French Law of November 22nd, 1913, recognises changes of nationality by joint-stock companies (see Article 31 of the Law of March 1st, 1925, introducing the institution of limited liability companies), it does not go into the details of the procedure for effecting such changes, although, as regards natural persons, the questions of expatriation and change of nationality are dealt with explicitly and in the minutest detail. English law merely lays down that for the purposes of civil law any corporation not domiciled in England is deemed to be a foreign corporation (JENKS, *Digeste de droit civil anglais*, Vol. I, 1923, page 6, Article 20). This definition is adequate to determine the legal effects, and there is no need to lay down detailed rules defining the scope of the idea of nationality and regulating its acquisition and loss. In the well-known case of the Bank of the United States v. Deveaux, Chief Justice MARSHALL denied that corporations could have nationality ("that invisible, intangible and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen"), but observed at the same time that in the pursuit of its special aims a corporation can possess the character of a national ("... as endowed for this *special purpose* with the character of the citizen"). In our opinion, the problem of nationality, but its transference to this special field, may be held to satisfy the exigencies of legal logic from the point of view of this "special purpose" alone.

III. SOLUTIONS

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The existence of an association having corporate personality cannot be separate from and independent of any legal system. We will not dwell upon the question whether the law creates personality or merely lays down the conditions for its recognition; for the purposes of codification we need merely point out that a corporation cannot possess personality except in virtue of the law to which it is amenable. It is impossible to contend that a company constituted at the North Pole would possess individual personality unless the legal system under which it was to be constituted was specified in advance. For our purposes the question of the nature of personality may be neglected; leaving its solution to philosophers and sociologists, we will merely state that, for the jurist, any personality, individual or collective, is artificial. According to the pragmatist view taken by American law, "la personnalité n'est pas une chose en soi, une entité juridique, mais plutôt une méthode de raisonnement, un moyen de mettre l'unité dans la logique du droit" (LEPAULLE, *De la condition des sociétés étrangères aux Etats-Unis d'Amérique*, 1923, p. 30).

Now the capacity of an association to exist and pursue its activities as a

unit endowed with personality and the law which invests it with that capacity are two closely related things. No corporation can be formed and constituted, act and function, unless it observes the law to which, from the moment of its constitution, it is subject. As M. ANZILOTTI has rightly pointed out: ". . . la persona giuridica intanto esiste ed ha una determinata nazionalità, inquanto v'è una data legislazione che le dà vita."

The law of constitution is therefore an essential condition of the nationality whose other conditions it determines.

But is this *lex constitutionis* the sole distinctive mark which can be decisive for the purposes both of the existing regulations and of the future codification?

In the first place, it must be observed that the law of constitution is not identical with the law of the place of constitution. The fact that a corporation constituted in a country A satisfies the formal and material requirements of the legislation of a country B is not sufficient to invest it with the nationality of the latter country if it has no material links (such as seat, centre of operations, subscribed capital, etc.) with the territory of the latter country. Constituted in accordance with the law of B and having its seat in A, it cannot possess the nationality of B because there is no link attaching it to the territory of B and enabling the law of that country to be applied.

Under Article 230, paragraph 4, of the Italian Commercial Code, companies constituted abroad are regarded as Italian companies, even so far as concerns the form and validity of their articles of association (though registered also abroad), provided that their seat and principal establishment are in Italy; they remain subject to all the provisions of Italian law (*cf.* Article 172 of the Belgian Law on Commercial Companies, Article 110 of the Portuguese Commercial Code, and Section 239 of the Roumanian Commercial Code). The legislation of the Argentine Republic, which does not admit the idea of nationality but adheres to domicile as the distinguishing mark, admits the corresponding formula (Article 286 of the Commercial Code, as amended by the Law of September 23rd, 1897; see the case of the Branch of the Bank of London and Rio de la Plata). The attitude taken by Argentine law is explained by the substitution of the idea of domicile for that of nationality. Starting from the theory that legal persons owe their existence to the law of the country which authorises them, it has been held that they are neither national nor foreign (ZEBALLOS, *De la condition dans la République Argentine des sociétés organisées en pays étrangers*; CLUNET, 1906, pp. 604 *et seq.*).

It is clear that neither the law of the place of constitution nor the law of constitution constitutes a link by itself: each of them only decides the question of nationality. If a State decided what law should be applied, ignoring the links recognised as effective by another State, that would amount to a limitation of the sovereignty of that other State.

The State's control over the existence and functions of a corporation is

bound up with the material circumstances which make the laws of that State applicable to certain relations arising in, or affecting, the territory of that State. If the law assimilates a corporate entity to a natural person as regards legal capacity (or, if the expression is preferred, the rights resulting from its mere existence), that capacity does not exist outside the territory subject to the particular legislation.

A natural person is amenable to the law of his personal status, even if resident outside his native country. A corporate body, on the other hand, is amenable to the law of the place where its life is centred—where the organs of the body, without which its existence is inconceivable, operate. If it resides outside the country in which it has its seat, it thereby becomes subject to the legislation of the country in which its newly selected headquarters are situated; that country will regard the corporation either as a branch or as a foreign company on the basis of its original nationality. If the corporation wishes to remain established outside its country of origin, it must comply with the conditions laid down in the law of the place where it wishes to establish itself in full legal independence.

Apart, therefore, from the factor of intention, allegiance depends on a material fact whose legal significance is determined by the competent legislation.

Within its territorial competence this legislation may determine the conditions constituting the material fact on the basis of such distinctive marks as may be thought suitable. Seat, working headquarters, place of constitution, subscription of capital, etc., may be considered material circumstances calling the laws of the country into operation. Mere intention is not a decisive factor; we may, for example, attach chief importance to the determination of the seat, but that determination will have no legal value unless it is in consonance with the facts. The freedom of the intentions to which the corporation owes its constitution cannot exceed the limits legally imposed on the arrangements of the parties concerned.

If we regard the test of nationality for corporations as analogous to the domicile of natural persons when not vitiated by any intent to defraud, the seat (*siège social*) of a corporation must be treated as a necessary link to bring the law of constitution into harmony with the material fact of establishment. The domicile of a person corresponds to the centre of a corporation's interests, and, as *CUQ* has rightly observed (*op. cit.*, p. 65), "pas plus une société qu'un individu ne peut se constituer artificiellement un domicile qui ne correspondrait pas au centre de ses intérêts."

Conversely, it is not allowable to say that in selecting its domicile—i.e., its seat (*siège social*)—a corporation can be constituted in accordance with any other legislation than that which operates in the place of that domicile. Is it conceivable that a corporation should be constituted in a country B and should yet be dispensed from observing the legislation of B as it affects the constitution of corporations? It is clear that the conditions governing

the establishment of a corporation are inseparable from the legislation to which its constitution is subject. The best proof of this is the well-known theory of *fictitious seat*. Similarly, a corporation constituted in accordance with the law of a country A cannot be held to be subject as regards its constitution to the law of a country B simply because it proposes to establish its headquarters in that country without observing the laws of its constitution.

These two factors are clearly inseparable. If we take the view that the material factor is the seat, the reason is that the seat is recognised as the decisive factor not only by authorities and judicial decisions, but also by current practice in treaties. The centre of operations is too variable and indeterminate to serve as the point of attachment; the reasons for its rejection are too well known to need repetition. Again, none of the complex standards (alternative or combined—*e.g.*, seat or centre of operations, seat and centre of operations) seems to us a suitable basis for codification. None of the other standards (Government authorisation, place in which capital was subscribed) can be expected to obtain general acceptance.

We may thus lay down the general rule that the nationality of a commercial corporation is determined by the law of its constitution (irrespective of the place of actual constitution) and by its effective seat, the legal determination of which depends on the law governing the constitution of the corporation. The material fact of domicile is necessarily bound up with the law regulating the existence of the corporation; in other words, the original seat cannot be situated elsewhere than in the country in which the corporation was constituted. There cannot be freedom of choice allowing the location of the seat to be determined in accordance with any law other than the law governing the constitution. States should therefore be internationally bound so that it would be impossible to fix the seat outside the territory and dominion of the law of constitution: the choice of the seat must be limited by the bounds of territorial sovereignty.

Accepting M. PILLET's theory (see his monograph *Des personnes morales en droit international privé*, 1914, pp. 133, 134), we would say that the law of constitution regards the seat as juridically adequate for its purposes. Following out this theory, we can avoid the idea of nationality by saying that the law of the country of constitution, in which the seat of a corporation is necessarily situated, "donne naissance au droit acquis à la personnalité civile" (PILLET, *op. cit.*, p. 134).

We have already pointed out that no international arrangement can be successful unless the standards for the determination of nationality are of a strictly *formal* character. The standard proposed above satisfies this condition: no restriction is placed on the freedom of States to regulate the constitution of corporations and to fix the legal conditions therefore; the only formal restriction concerns the determination of the seat of the corporation, and is to the effect that it can only be established in conformity with the law

of the place in which it must necessarily be situated; the law of location would be identical with the law of constitution.

Accordingly it would be internationally prohibited to regard corporations constituted in accordance with a given law as national if their effective seat is not subject to that law. A corporation may establish its seat wherever it pleases in the territory of the country in which it is constituted, but freedom of choice ceases outside that territory. The seat may be fictitious and not the same as the actual seat, but this possibility only exists within certain territorial boundaries; there the fictitious seat may even prevail over the actual seat (see, for example, paragraph 24 of the German Civil Code). But it would be abnormal for any legislation to confer the quality of a national on a corporation having its seat in a foreign country and subject to the laws of the former country on the ground that its original constitution took place there. Such a practice would give rise to intolerable conflicts.

Lack of concordance between the actual seat and the statements in the articles of association, when these are not consonant with the facts, should be remedied by international action. For this reason the clause in paragraph 23 of the German Civil Code, authorising the ascription of nationality even where the seat of the corporation is situated outside Germany, can only be regarded as having legal importance so far as concerns relations territorially linked with Germany or legal consequences localised there (ISAY, *op. cit.*, p. 184); the international scope of its application is highly problematic, and NEUMEYER is quite right in pronouncing against the general applicability of such a principle, which he regards as an encroachment upon the sovereignty of foreign countries (*Internationales Verwaltungsrecht*, Vol. I, p. 129; *Mitteilungen der Deutschen Gesellschaft für Völkerrecht*, Vol. II, p. 159).

The general principle must be recognised even in the system of authorisation. A State would not admit the validity of an authorisation by a foreign Government unless it applied to a corporation constituted and having its central office in the foreign State. The international competence of the foreign Government would have to be denied (*cf.* MICHOD, *op. cit.*, Vol. II, p. 325, No. 1). An international arrangement on these lines would undoubtedly obviate positive and negative conflicts arising out of the double nationality or lack of nationality of corporations—conflicts which might make it uncertain whether the corporations had legal capacity or should be treated as *de facto* corporations which must necessarily be wound up. Conflicts between the actual seat and the seat according to the terms of association, or between the seat and the centre of operations, would also be eliminated.

It should further be noted that the criterion proposed for an international arrangement is not contrary to modern doctrine and practice in the United States. According to the classical theory, a corporation is held to be foreign if it is constituted by a State other than that in which the court trying the case is sitting. The conception of nationality, therefore, is not based on

domicile; the sole decisive factor is the law of constitution (LEPAULLE, *op. cit.*, pp. 63, 64). If we suppose that in virtue of the principle of the territoriality of laws the domicile of the corporation is always in its country of constitution, even if it is really situated abroad, the domicile will always be tied fast to the country of incorporation (LEPAULLE, *op. cit.*, pp. 70, 71). No effective link seems to exist between constitution and domicile. This lack of consonance between law and fact is corrected by the modern development of American ideas of domicile, which is regarded as effectually linked to the law of constitution. HENDERSON (*The Position of Foreign Corporations in American Constitutional Law*, 1918, pp. 191 *et seq.*) observes: "For constitutional purposes it seems necessary that some further criterion than the State of incorporation be adopted to determine citizenship and domicile." The normal case is that in which when a corporation is formed its real seat depends on the laws under which it was constituted. Abnormal cases must be neglected: a corporation may be formed in a country A, but it may be stipulated that it can be domiciled in any country except the country of its constitution; or the real seat of a corporation may not correspond to the laws of its constitution ("whose principal office is in another State than that of its incorporation"). Such corporations, which are known in the United States as "tramp" or "migratory" corporations, cannot be recognised. HENDERSON brings out the importance of the principle that "only such corporations could do business in the State as were incorporated under the law of their physical domicile." Similarly, the draft of the Uniform Corporation Law prepared by the Commissioners on Uniform State Laws lays down the general principle that the territorial link between the seat and the law of constitution must be present ("the principal business office to be within the State of incorporation"); foreign corporations not satisfying this condition are not to be recognised (see Report of the Commissioner of Corporation on State Laws concerning Foreign Corporations, 1915).

The arrangement outlined above differs from the projects accepted by the Institute of International Law and by the International Congress of Joint-Stock Companies held at Paris in 1889, in so far as these projects do not sufficiently emphasise the essential connection between the competent law and the material fact of domicile. The Institute's project (*Year-Book*, 1891, Hamburg Session: Report by M. LYON-CAEN on the conflict of laws relating to joint-stock companies, pp. 152-161) treats as the country of origin the country in which the legal seat has been genuinely established (Article V, pp. 171, 172; also the Treaty of Montevideo, Article V: "The Laws of the Country of their Domicile"). The reference to Article I of the rules adopted by the Institute gives no explanation on the essential point of the necessary relation between the law of constitution and the seat; there is a mere mention of "corporations constituted in conformity with the laws of their countries of origin." It is conceivable, however, that a State might allow a corporation to establish its seat in its territory, in which case such

seat would be the legal seat under the laws of that country, and that the law of constitution would be satisfied with formal registration and the adoption of a fictitious statutory domicile. This would be a typical case of double nationality. It is for this reason that, in determining the country of origin, account must be taken of two factors which are, in our opinion, decisive. The expression "country of origin" remains ambiguous, for the country of origin cannot be determined by the seat, since the latter depends upon the conditions laid down in the competent legislation. On the other hand, the law of constitution by itself is inadequate unless it attaches importance to the actual circumstances (real domicile) which is subject to that law and linked with the legislation of the country. The conception of a "legal" seat which may be purely official and fictitious is not a suitable basis for an international arrangement.

Thus, English law, while recognising the principle of the seat (*siège social*) holds that registration (*i.e.*, the making an association amenable to the law of its constitution) cannot in all cases be decisive. DICEY and KEITH observe (*Conflict of Laws*, 1922, p. 165): ". . . but the registration of the company is not for all purposes of itself decisive. The question in each case is: where is the real business of the company carried on? According to the answer to that question the company's domicile must, in the main, be determined." The conflict between the actual seat and the seat according to the terms of association, which must be considered as the legal seat, is obvious. English law does not recognise the domicile constituted by the registered office as decisive, if for the purposes of taxation or determining judicial competence other distinctive marks have to be taken into consideration. "Hence, a corporation, moreover, will be considered domiciled, or resident, in a country for one purpose and not for another, and hence, too, the great uncertainty as to the facts which determine the domicile or residence of a corporation (DICEY and KEITH, p. 154). WESTLAKE also observes that the incorporation, *i.e.*, the constitution of a company "is not conclusive of its residence" (*Private International Law*, 1905, p. 361).

This is why the formula proposed by the International Congress of Joint-Stock Companies held at Paris in 1889 is preferable. According to the Congress's resolution, the nationality of a joint-stock company should be determined by the law of the place in which it has established its seat. The seat of a company cannot be situated elsewhere than in the country in which the company was incorporated.

The essential connection would thus be made between the law of constitution and the seat as established in accordance with the requirements of that law. We must therefore reject the solution proposed by the Second Congress of Joint-Stock Companies, held at Paris in 1900; the resolution advocating the determination of nationality on the basis of the principal places of business (centre of operations), or on the basis of the actual seat *as fixed in the articles of association*, represents an intermediate system which has all the

defects of a compromise; for to leave a choice (place of business or seat) amounts to sanctioning uncertainty and arbitrary decisions. Moreover, the fixing of the seat in the articles of association does not afford the necessary guarantees, even if that seat is accepted as genuine; it should be laid down that the seat as fixed in the articles of association should conform to the requirements of the law of constitution and should not be situated in any country other than that to whose legislation the corporation itself is subject.

2

The solutions considered above are concerned with commercial corporations possessing legal personality. As regards associations of persons as such, it is well known that the laws of many countries do not recognise them as having this legal status. Partnerships in English law and "offene Handelsgesellschaften" in German law do not possess legal personality. Is the conception of nationality admissible in these cases, and should not the international arrangement take any differences into account, in order to prevent conflicts?

The main question whether a company does possess legal personality must be settled by the law to which the company is amenable. It is a well-established rule in international private law that the status of an association depends on the competent law—i.e., the law governing the formation of the association. "Whether a partnership is a corporation depends on the law of the country in which it is formed" (DICEY and KEITH, p. 151).

Can the question of nationality be settled by reference to this competent law? We do not regard such a solution as reasonable; for, *first*, the territorial laws do not deal with the nationality of associations which have no individual personality; and, *secondly*, we are attempting to reach an international arrangement which must override the territorial law.

For the purposes of such an arrangement, associations without personality must be assimilated to associations with personality. There is no reason for adopting a special rule for associations of individuals as such, even if their legal personality is not established. The two essential factors—the law of constitution and the actual seat—are known, just as in the case of those associations which are held to be legal entities. We are in favour of the general rule expressed in M. DE BUSTAMANTE'S project in the following terms (Article 18): "Civil, commercial or industrial companies, other than incorporated companies, shall have the nationality of the place in which their principal centre of management or direction is habitually situated."

It is understood that the place referred to must be situated in the country in which the company was formed.

Further, it must be remembered that partnerships (*sociétés en nom collectif*) although not possessing legal personality in some countries, nevertheless possess privileges ordinarily attached to the idea of personality; they

cannot be treated differently from companies whose legal constitution is based on the assumption of their inherent personality (cf. WIELAND, *Handelsrecht*, Vol. I, 1921, pp. 617-619, on the nationality of partnerships in German law).

The solution proposed would in no way restrict the freedom of individual legislations to determine the essential conditions for the formation of a partnership with the status of a national company. It has been suggested that in French law (which is generally favourable to the view that such associations have individual personality) a partnership should, in order to have French nationality, have at least a majority of French members, and that its managers should be French; proposal of M. LYON-CAEN; see LEVEN, *op. cit.*, pp. 58, 59). The international arrangement will not encroach upon this freedom, for it will be for local legislation to determine the essential conditions for the constitution of partnership, just as it could make the formation of joint-stock companies conditional upon the greater part of the capital being taken up by nationals or upon the inclusion of nationals on the board of directors.

The legislator will not, of course, go so far as to prohibit entirely the formation of partnerships by any or certain foreigners in his territory; he will simply lay down that, if foreigners wish to form such associations, nationals must participate.

It is for this reason that all methods of determining the nationality of partnerships by the nationality of their members must be rejected. Even if the association is not a distinct legal entity, its nationality cannot be determined by reference to the criterion mentioned above, because the members may have a wide variety of nationalities. There is on record a case tried by the Court of the Department of the Seine (decision of March 13th, 1915) in which a company formed in France consisted of a Dane, a German and an Englishman. As M. WEISS has rightly remarked: "Regardera-t-on la nationalité du plus grand nombre? celle des gérants? les capitaux exposés par chacun? et à quel moment se placera-t-on pour envisager l'une ou l'autre de ces circonstances? Mais il y aurait là une source de difficultés inextricables, sans parler des préjudices souvent graves que ce système fera éprouver à la minorité" (*Traité, II*, p. 416).

Moreover, such a criterion can have no force in a third State if the members of a partnership (*société en nom collectif ou en commandite*) without legal personality, constituted abroad, are not nationals of that State. What method could be employed to determine in English law the nationality of a partnership (*société en nom collectif*) formed in Germany, if some of the members were Swiss and others Italians? Unless the location of the seat is taken as a criterion, all the possible criteria must fail. The criterion specified above can be accepted in cases where all the members are of the same nationality, and only in regard to matters where local legislation favours nationals to the detriment of foreigners (e.g., in regard to the *cautio judicatum*

solvi—*cf.* the decision of the German Reichsgericht, Vol. 36, No. 100—the purchase of immovable property, or cases in which the company is formed with the intent to evade legal prohibitions—*cf.* the decision of the Polish Supreme Court, Third Division, November 12th, 1921).

I do not feel that there is any point in regulating such peculiar situations by international action; the general principle must be the same for all companies, irrespective of their position as regards legal personality. This method should eliminate all uncertainty in international relations, whereas the application of the principle formerly laid down by the Swiss Federal Tribunal (decision of November 11th, 1892, *CLUNET*, 1893, p. 640) that the nationality of a partnership (*société en nom collectif*) is determined by the nationality of its members, creates an opening for disputes of the most undesirable nature and might lead to a difficult or even inextricable situation.

3

Is it necessary, in any arrangement that may be arrived at, to give a definite decision as to the nationality of associated companies and branch establishments of foreign companies?

If we consider an associated company as an association which is formally independent of the mother-company, the question of its nationality calls for no special solution. The associated company will have the nationality fixed by the law of its constitution and corresponding to its actual seat; it will be formally invested with individual existence and will enjoy an independent legal status (*PILLET, Traité*, Vol. II, p. 794).

When, however, we come to deal with dependent agencies of foreign companies, having no separate individual existence, we find that these have no independent nationality. Their nationality is that of the company to which they belong. This would be so even if the company had no legal personality (*cf. Rodocanachi, Sons & Co. v. the United States*, in *MOORE, International Arbitrations*, Vol. II, pp. 2359, 2360: “. . . where a firm has a main house in one country with branches in other countries, the analogy between a corporation and a partnership is complete, and the country where the main house is situated gives the firm the impress of nationality”).

The law of the country in which the branch is to be established will determine the conditions for its admission and will discriminate between branches of national companies and subsidiaries and branches of foreign companies. In some cases it will ask for evidence that the mother-company is constituted in accordance with the law of its country of origin (*e.g.*, in Austrian, Polish and Swiss law, etc.), thereby emphasising their foreign character, it may demand reciprocity. This legislation treats nationality as a preliminary point, and concerns itself principally with the authorisation and registration of branches intended to operate in countries other than the country of their constitution and central establishment. These problems do not affect the

strict question of nationality. Further, the local law can lay down special conditions for the organisation of a branch establishment (separate capital, responsible agent, etc.).

In pronouncing in favour of a strictly formal solution, we find ourselves unable to share the view that the nationality of independent associated companies can be settled on different lines if their operations depend on, and genuinely have an intimate connection with, the existence of a foreign mother-company. It is argued that if an associated company formed directly by a foreign company remains under the latter's control, it must be regarded as sharing the nationality of the central establishment, even if it is constituted in accordance with the local legislation; and it is therefore proposed that the question of nationality should be settled by reference to the degree of independence which the associated company possesses. If an associated company is completely dependent, says CUQ (*op. cit.*, p. 30), the true position is that a new company is formed, whose nationality must be determined by the usual methods. If not—if the associated company has the character of a subsidiary—it must keep the nationality of the main establishment.

In our opinion, the grounds for this view are extremely vague, and it would involve a reversion to the principle of "control," which we do not regard as suitable for any future arrangement.

Whatever may be the essential character of a commercial corporation formed in a particular country and having its actual seat in that country, there can be no question of its nationality. Measures are, indeed, sometimes taken to protect national or territorial designations (French company, Swiss company, etc.), but they do not refer to nationality in its strict sense; they must merely be regarded as special arrangements in regard to unfair competition, designed to obviate certain ambiguities injurious to the economic life of the nation. But an associated company constituted in accordance with the local law does not cease to be a company with a definite nationality, even if it is forbidden to use certain designations in its registered title for purposes unconnected with its individual status.

4

The question of changes of nationality by commercial corporations is not open to any uniform settlement by general convention. There have, of course, been numerous controversies over the question—frequently raised both by authorities and in the courts—whether a corporation is entitled, as a legal person, to change its nationality, and, if so, whether it must then be regarded as dissolved or it retains its original personality. If we accept the latter hypothesis, we must assume that on changing its nationality the corporation will simply pursue its activities abroad. In other words, the question at issue is whether a corporation can change its nationality without being dissolved (see PERROUD, *Du changement de nationalité d'une société anonyme*; CLUNET, 1926, pp. 561 and following).

We do not deny the gravity and the practical importance of this question, which has so often arisen in the courts (*Reichsgericht*, Vol. VII, p. 68; French Court of Cassation, November 26th, 1894; DALLOZ, 1895, I. 57, 29; III. 1898; DALLOZ, 1899, I. 595; Decision of the Chancery Division, July 31st, 1909, *ex parte Fox in re Irrigation Company of France Ltd.*). It would be most valuable to be able to clarify the legal situation by determining whether the corporation does or does not retain its original nationality until such time as it has complied with the formalities of the law of the country which it proposes to adopt, and whether its personality continues to exist in spite of the change of nationality. We do not feel, however, that this problem can be solved by a multilateral convention. If we decide to prohibit absolutely any change of nationality, that amounts to insisting on the dissolution of any company wishing to withdraw from the control of the legislation to which it became subject on incorporation. We fail to see any need for the adoption of such prohibitive measures in a convention. If we agree to the possibility of a change of nationality (subject, of course, to the regulations concerning the unanimity of the members, the settlement of debts, etc.), the question whether the original personality does not cease to exist in spite of the change of nationality must be settled by the local legislation of the countries concerned. The legal consequences deriving from the regulations in force in the original country and in the new country cannot give rise to serious conflicts. If the original country considers that the change of nationality entails the dissolution of the company, the latter's assets can be transferred to the new company, since the members are not restricted as regards the methods and conditions of liquidation. If, at the same time, the new country recognises the continued existence of the personality which existed prior to the change, the question of the responsibility for the company's debts incurred during its existence in its country of origin does not arise; for the company is either already liquidated or possesses the new nationality and succeeds to all the rights and liabilities of the company dissolved in the country of origin, being accordingly responsible for its debts.

The dangers of "discontinuity" of civil personality may arise where change of nationality takes places *in fraudem legis*: if the seat is removed in order to evade the local law, and if this removal is purely fictitious, the legislation of the country in which the company was incorporated will have at its command effective means of dealing with these difficulties. The transference of a company to the control of a legislation other than that of the country in which it was incorporated and in which it has its seat is not *ipso jure* effectual; the company must also establish its genuine and effective seat in that country, breaking all the legal and *de facto* bonds that attached it to the legislation of the country where it was originally incorporated. French jurisprudence, which has elaborated the theory of the fictitious seat in the utmost detail, has frequently declared that alleged foreign companies constituted with a fictitious seat abroad in order to defraud French law are

French by nationality (*cf.* GAIN, *La nationalité des sociétés avant et depuis la guerre 1914-18*, Paris, 1924, p. 94).

If a rule were laid down to the effect that nationality depends equally on two decisive factors—the law of constitution and the actual seat—a change of nationality, not taking into account the transfer and effective establishment of the seat abroad, would not be recognised either in the country of original incorporation or in the country of reconstitution.

It would therefore suffice to say that a *change of nationality* by a commercial corporation must be recognised by the contracting parties provided that, when the corporation adjusts itself to the legislation of the country to which it will in future be subject, its actual seat is at the same time genuinely transferred to that country. The fiction of a new establishment will produce no legal consequences, nor will the original nationality be changed, since the new nationality will not be acquired (*cf.* PERROUD, *op. cit.*, p. 567). Any change of nationality without change of seat is null and void. Moreover, the conditions laid down by the foreign laws which will in future govern the company must be satisfied; if they are not satisfied, the company will be dissolved.

The questions of the continuance of legal personality, the dissolution of the company, and its continuity or lack of continuity cannot be dealt with in an international arrangement.

It will further be observed that changes of nationality due to cession or annexation of territory cannot be made the object of a uniform regulation. Cases of this kind cannot be subject to general rules, because the freedom of the Contracting Parties must be maintained and reserved. At the same time, it may be of interest to observe that, both in conventions dealing with changes of nationality by corporate bodies and in the jurisprudence dealing with that subject, changes recognised in virtue of cessions of territory do not entail the dissolution of companies which remain in existence, although their political allegiance is transferred (*cf.* the convention of November 4th, 1911, between Germany and France regarding their possessions in Equatorial Africa, Article V, paragraphs 2, 3; decisions of the Financial Commission which met at Paris in 1913, determining the status of companies affected by the dismemberment of Turkey; Article 54, paragraph 3, of the Treaty of Versailles; Article 75 of the Treaty of St. Germain; in a convention concluded between Poland and Austria with reference to producing and transport undertakings, Annex C to the Commercial Convention signed at Warsaw on September 25th, 1922, the Austrian Government granted certain companies with their seat in the territory of the Austrian Republic the right to transfer their seat to Polish territory, the companies not to be wound up at the time of transference, and to retain their personality and acquire a new nationality without being dissolved).

This view is accepted in American jurisprudence, which recognizes the general principle that territorial changes involve changes of nationality

(see decisions in the cases of *Dartmouth College v. Woodward*, 4 Wheat. 636; *Martinez v. Asociación de Senoras*, 213 U. S. 20 (1909); also a note by MOORE, *Digest*, Vol. III, p. 804).

5

The criterion of nationality being thus determined, the following question arises: is it also necessary to determine the State to which the right of affording diplomatic protection, where necessary, would belong? Would it be useful to include a clause dealing with this point in an international convention?

Project No. 16 on "Diplomatic Protection," drawn up at the request of the Governing Board of the Pan-American Union, settles this question in a very simple way, by laying down the following provisions in Article 9 (*Codification of American International Law*, 1925, pp. 55, 56): "Every American Republic has the right to accord diplomatic protection not only to its nationals but also to the companies, corporations, or other juridical persons who according to its laws, are of the nationality of the country."

This clause does not presuppose the determination of nationality according to an international rule; it makes reference to the criteria of nationality which have found their legal expression in the legislation of the individual States parties to the Convention. This state of affairs may give rise to disputes if the various local criteria differ; the right to protection may become problematical if it is disputed between two interested States, each considering that the company possesses its nationality. If we decide in favour of the general and uniform determination of nationality by convention, the difficulties described above can be entirely avoided.

Moreover, the rules regarding diplomatic protection of companies cannot be identical with those as to the protection of natural persons. It is well known that, in the case of a change of nationality, the right to diplomatic intervention is lost where protection is denuded of its "national" character by the injured party acquiring a nationality other than that which he possessed at the time of the act or event which gave rise to the complaint (see BORCHARD, *Les principes de la protection diplomatique des nationaux à l'étranger*, Bibliotheca Visseriana, Vol. III, p. 46). But the well-known manoeuvre of the fictitious seat may make it appear that the company has a certain nationality, although such is not the true legal situation. In this case, we cannot speak of a change of nationality in the proper sense of the words; the "pretended" nationality concealing the true allegiance exists from the beginning of the legal existence of the company. To what State should the right of according diplomatic protection belong in that case?

The formula excluding diplomatic protection in the generally accepted case of change of nationality would be inapplicable. If the distinctive marks of nationality are not determined by international agreement, the conflict between the real and the apparent nationality will lead to further conflicts,

which would not come under international private law but might give rise to political disputes. The country concerned, regarding the foreign company as national on the ground of its fictitious seat, will take action for its compulsory liquidation or dissolution; whereas the country of origin will regard measures of this kind as incompatible with its own legislation, under which the company was incorporated (*cf.*, for example, the decision of the Paris Court of Appeal, November 9th, 1922, SIREY, 1923, 333: ". . . que le siège social véritable d'une société n'étant pas forcément dans le pays où les statuts l'indiquaient et que les tribunaux auraient le pouvoir de déterminer le lieu où se trouvait le siège effectif de la société"). Again, conflicts may arise in connection with the licensing of a foreign company in order to enable it to operate in another country if that other country refuses the licence on the ground that the seat was deliberately established abroad for the purpose of evading the local law.

Conflicts of these kinds could be avoided if uniform rules were accepted governing the nationality of corporations. The mere application of the rules for the protection of natural persons would be unsatisfactory, and, indeed, dangerous, having regard to the political conflicts which might ensue.

The international arrangement would not, of course, in any way affect the conditions on which protection would be granted to companies of any given nationality; these would depend entirely on the legislation of the State concerned (see Article 2, paragraph 2, of the American Project).

If the State to which the right of according diplomatic protection is to belong is determined on the same lines as the nationality of corporations, according to a rule to be stipulated by a general convention, the question arises whether the renunciation of the right to protection by a foreign company in a contract or concession should be regarded as valid and as excluding that protection, or whether such renunciation should be regarded as null and void on the ground that it has no legal force.

The so-called *Calvo clauses*, well known in the Latin-American countries, have given rise to many difficulties, particularly in connection with questions affecting corporations which have accepted these restrictions. As a matter of legal construction the application of these clauses seems very doubtful.

In the case of the North and South American Construction Company, an American corporation, in a contract concluded with the Chilean Government, renounced the right to demand the protection of its country of origin. Article 18 of the contract (see MOORE, *International Arbitrations*, Vol. III, pp. 2318 *et seq.*) was as follows: "The contractor or contractors will be considered for the ends of the contract as Chilean citizens. In consequence, they renounce the protection which they might ask of their respective Governments, or which these might officiously lend them in support of their pretension."

The arbitrators decided that this clause had no validity, and observed

that the contract created a special jurisdiction to deal with disputes between the Chilean Government and the corporation (Article 49: ". . . arbitrators named, one by the Ministry of Industry and Public Works, another by the Supreme Court of Justice, and the third by the contractor"). As the Chilean Government abolished this special jurisdiction by a unilateral act, that act automatically restored the right to protection (" . . . has recovered its entire right to invoke or accept the mediation or protection of the Government of the United States").

If we assume that this clause binds the company in its relations with the other party to the contract (the Chilean Government), it does not affect the United States Government. The right to protection and the possibility of invoking it are not vested in the citizens themselves, and therefore the renunciation of those rights cannot impose any obligation to abstain from action on the State to which a company belongs by virtue of its nationality. The Government can take action *ex officio*, without waiting for a request from the injured company. A company cannot dispose of rights which are not vested in it and do not belong to it. Still less can a company arrange its nationality as it pleases; it has no power to say that in spite of its foreign status it agrees to be treated as national so far as concerns the right to diplomatic protection. If such a clause were valid, that would be equivalent to the recognition of a double nationality, whereas in reality it must be interpreted as conferring an exceptional competence on the local Government (e.g., unconditional submission to the competence of the courts of the contracting Government, sureties to be provided, deposit of working capital for the company, auditing of the accounts and their verification by the local authorities—see LEVEN, *op. cit.*, pp. 413-415).

Moreover, the case of the North and South American Construction Company was very rightly settled by the rejection of the Chilean Government's pleadings and the recognition that the clause in the contract did not entail the loss of United States nationality ("it is undeniable . . . that the memorialist is a company which . . . has neither relinquished nor lost its quality of American citizenship, even when it conditionally agreed to be considered as a Chilean citizen for the ends of the contract, and not to invoke or accept the protection of its own Government"—MOORE, *op. cit.*, Vol. III, p. 2321). Consequently the right to diplomatic protection was safeguarded. (On the clause renouncing diplomatic protection in the case of the Orinoco Steamship Company, and the decision of the umpire BARGE, see SCELLE in the *Revue de droit international*, 1911, pp. 179 *et seq.*).

The main problem—whether companies in general can enjoy diplomatic protection is not disputed in international practice. It has arisen in connection with arbitration conventions dealing with claims by private individuals, though no explicit reference was made to corporations (see the cases cited by DE LAPRADELLE and POLITIS, *Recueil des arbitrages internationaux*, Vol. I, p. 447; Vol. II, pp. 134, 353). Certain arbitration conventions ex-

pressly mention claims advanced by corporations or companies as being on the same footing as claims by natural persons (see Treaty of February 8th, 1853, between the United States and Great Britain, in DE LAPRADELLE and POLITIS, Vol. I, pp. 662, 663); Washington Joint Commission—Colombia and the United States—May 18th, 1866, *op. cit.*, Vol. II, p. 462; Guayaquil Joint Commission, August 17th, 1856, Vol. II, p. 422; Lima Joint Commission, August 17th, 1856, Vol. II, p. 422; Lima Joint Commission, December 4th, 1868, and February 28th, 1870; Convention of Santiago of April 17th, 1870 (see CALVO, Vol. VI, p. 359). It must be accepted that, even if no reference is made in the arbitration agreement, claims by corporations are to be regarded as implicitly included among claims by nationals. Generally speaking, the rule laid down by MOORE (*Digest*, Vol. VI, pp. 641, 642) that "the corporation is recognized as having for the purposes of diplomatic protection the citizenship of the country in which it is created" must be recognized as admitted by international practice and jurisprudence.

If the criterion of nationality was uniformly settled by general convention, the questions in dispute in regard to the admissibility of diplomatic protection would cease to arise. The law of constitution and the actual seat being the fundamental bases of nationality, the scope of protection could be strictly limited. All reference to the nationality of the partners or shareholders would have to be rejected—a view frequently taken in diplomatic practice, but nevertheless giving rise to disputes (for the American practice see HENDERSON, *op. cit.*, pp. 52–54). It is understood that the recognition of the right of corporations to diplomatic protection in no way prejudices the question of the protection of individuals associated with such corporations. In these cases, however, the question of the protection of corporations as such does not arise; it is in the interests of individuals that diplomatic action is taken. If the country to which a corporation belongs infringes the rights of a member of that corporation on the ground that he is a foreigner, the country of which he is a national may base a claim thereon, although the corporation has the nationality of the country which is taking the vexatious measures. Intervention of this kind has no connection with the question of the protection of corporations as independent and autonomous entities. As regards claims by corporations as such, however, the principle has been recognized that such claims, if presented or upheld by Governments, will not be admissible except where the corporation is constituted under the laws of the claimant State and has its seat in the territory of that State.

Nevertheless, in some cases Governments have hesitated, and even refused, to grant diplomatic protection, on the ground that a corporation consisted entirely of citizens of foreign countries (see the case of the Orinoco Steamship Company, in the first stage of which the British Government refused to intervene on behalf of a company registered in London because all the shareholders were of American nationality, and possibly also because in its contract with the Venezuelan Government the corporation had renounced the

right to protection). As a general rule, however, the nationality of the partners or shareholders is not taken into consideration; in the case of *Henry Chauncey v. Chile* (Chilian-American Joint Commission) it was ruled that Allsop and Co., being incorporated in Chile and legally domiciled there as a civil person, could not demand American protection on the ground that the partners possessed United States nationality (see MOORE, *Digest*, Vol. III, pp. 802, 803: "it was held that the firm was to be considered for international purposes as a citizen of Chile, and was therefore incapable of prosecuting through its representative a claim against Chile as a citizen of the United States of America before an international commission"). Similarly, in the well-known case of the S.S. *Antioquia*, which belonged to a Colombian company known as the *Compañía Unida de Navegación por vapor en el Rio Magdalena*, the American Government refused its support despite the fact that all the members of the company were of American nationality (MOORE, *Digest*, Vol. VI, p. 645: "the association as entity was assimilated to a citizen of Colombia"; also the case of the *Compañía Salitrera del Peru*, *op. cit.*, p. 646: "even if all the individual members of the corporation were duly qualified American citizens, they could not present their complaint in their individual names as owners but must present them as belonging wholly to the corporation as owner"). American practice has followed the line indicated in the decision in the case of the *Canada Southern Railway v. Gebhard* (1883), 109 U. S. 527 ("distinction between a corporation and its shareholders"), by making it clear that the transference of shares cannot affect the original nationality of a company ("but the mere transfer of shares between individuals does not affect the complete subjection of the corporation itself to the Government which created it"). If intervention were admissible, that would amount to an encroachment on the sovereignty to which the corporation, being constituted in accordance with the legislation of the competent State, is subject.

This view was taken in the case of the *Rosario Nitrate Co., Ltd.*, decided on November 22nd, 1895, by the Anglo-Chilian Tribunal (see LEVEN, *op. cit.*, p. 262), and in the award rendered by the Joint Commission of the Netherlands and Venezuela in the *Baarch and Romer* case, 1902.

At the same time, the practice is not fixed and well established; Governments frequently make representations, even though the corporations are not subject to them by constitution and domicile. In this connection we may recall the case of the *Vacuum Oil Company*, which was a Hungarian incorporated company with its seat at Budapest. The United States Government made representations to the Austrian Government on the ground that the company had been formed by the *Standard Oil Company*—an American corporation. The Austrian Government took the view that these representations were unjustified and that intervention could come only from the Government in whose territory the corporation was domiciled. A similar situation arose in the case of "*Limanova*," an Austrian limited com-

pany in which French capital was concerned. This company complained of certain measures taken by the Austrian Government, and the French Government put forward claims on that ground; but the Austrian Government again raised the question of competence and legitimation *ad causam*, which it would not recognise as belonging to the protecting State in view of the fact that the company had Austrian nationality (see JACOBI, *La condition juridique des sociétés anonymes étrangères*, International Law Association, XXVII, Conference 1912, p. 379). Again, in the cases of M. Murdo (arbitration between the United States and Great Britain of the one part and Portugal of the other part) and El Triunfo Co., Ltd. (arbitration between the United States and Salvador), it will be seen that the awards departed from the principles accepted in the S.S. *Antioquia* case (see MOORE, *Arbitrations*, Vol. II, pp. 1865-1899; *Digest*, Vol. VI, pp. 647-651). These were cases of concessions unjustly revoked or fraudulent practices (fictitious bankruptcy); similarly, the companies on whose behalf protection could not be invoked transferred their rights to national companies.

On account of the confusion of individual and collective rights in the cases in which protection is invoked, it is sometimes difficult to determine the limits within which diplomatic protection can be regarded as legitimate and within the competence of the State properly entitled to the right of intervention. If we take the view that corporations cannot be held to have any genuine nationality, and if we substitute the simple conception of domicile, we may conclude that the idea of *protection* is inapplicable; in that case we must reject the ingenious theory of autonomous collective rights, which would justify intervention independently of the protection of individual rights; and the right of protection cannot be based on the members of the corporation unless their nationality is taken into consideration. It would therefore be improper to say that this right extends to the collective body, since the latter may be foreign even if all its members are nationals (see PILLET, *Traité*, Vol. II, p. 782). In connection with the practice of arbitration tribunals, which have frequently pronounced in favour of the pure and simple application of this right, DE LAPRADELLE and POLITIS have raised very grave doubts by advancing the view that for the purpose of diplomatic protection it would be difficult to give any consideration to a corporate body, an abstract creation of law, and to cloak under a theoretical nationality the real nationalities of human beings. It is therefore proposed that for diplomatic protection proper there should be substituted *legislative* protection dealing with the rights of access to the courts, civil rights, the application of national laws, etc. (*Recueil*, Vol. II, pp. 590-592).

Is not this substitution purely apparent, concealing a mere play upon words?

If a national corporation recognised and licensed to operate in a foreign country suffers damage from that country or its nationals and does not receive satisfaction for its legitimate claims (*e.g.*, denial of justice), is not the

country to which it belongs entitled to intervene? If it is subjected to petty annoyances and discriminations, can the State to which it belongs remain unmoved and refrain from enforcing its rights under existing treaties, on the sole ground that the corporation is an abstract creation of law?

What would be the real difference between legislative protection and diplomatic protection? No strict and clear definition could cover it.

We do not deny that in accepting the analogy, between diplomatic protection for individuals and diplomatic protection for corporate bodies, we are failing to deal with certain difficulties of theory and practical application, particularly in the case of associations (partnerships, etc.), which certain legislations do not recognise as having legal personality. It would be strange that a partnership (*société en nom collectif*), not possessing independent personality under the law of its constitution, should invoke the protection of the State to whose law it owes its origin if it consists of citizens of the country in which it operates and should resort to diplomatic aid against the latter country on account of what it regards as unfair and vexatious treatment. The same situation would, however, arise if the partnership had legal personality, inasmuch as its operations would really be nothing more than a faithful reflection of the individual operations of its members.

In view of the theoretical difficulties which arise in cases where the nationalities of the members are not the same as the nationality of the association, the practice on this point is by no means consistent.

In the case of Ruden et Cie., decided by the Americo-Peruvian Joint Commission (Lima Joint Commission, Convention of December 4th, 1868) the Commission ruled that it was not competent to decide as to the claims of the company, since, being constituted and domiciled in Peru, it was subject to Peruvian law; the Commission could only decide upon claims by a member of the company who possessed American nationality (see DE LAPRADELLE and POLITIS, *Recueil*, Vol. II, pp. 588 *et seq.*; also the case of L. S. Hargous v. Mexico, in MOORE, *Arbitrations*, Vol. III, pp. 2327 *et seq.*). It has been pointed out that by accepting a claim by an American member of a Peruvian company the arbitrator rejected the abstract conception of the personality of the company and looked only to the real personality of the member (*op. cit.*, p. 592). Difficulties might arise if the company were American and all the members had Peruvian nationality. For this reason, few authorities are in favour of the extension of diplomatic protection to unincorporated companies (see MOORE, *Digest*, Vol. VI, pp. 640, 641).

The question was not settled by the arbitral award rendered in the Canevaro case (decision of May 3rd, 1912), in which the conflict did not arise in its strict form. The court, having established that the company known as José Canevaro y Hijos was Peruvian on two grounds (location of its seat and nationality of all its members), was not called upon to settle a disputed point; the establishment of that fact was considered sufficient. It may, however, be observed that although the company had an individual per-

sonality under Peruvian law the court expressly emphasised the nationality of the members. It made no pronouncement on the possible case of the nationality of the members differing from the nationality of the company.

Would it be desirable to lay down explicit rules for these special cases and settle the difficulties which arise in connection with differences between the nationality of the members and the nationality of the company? Can it be admitted that protection would only be lawful when the two nationalities could be proved to be identical, or at least when it could be shown that the rights and interests of members having the same nationality as the company itself were predominant? To agree to this would be to revert to rules which have been rejected both in theory and in practice, to the effect that the nationality of an unincorporated company should be determined by the nationality of its members or of a majority of them. If it is decided to make an international arrangement fixing the nationality, distinctions between partnerships and joint-stock companies must be eliminated. At the same time, the State whose protection is invoked is not bound to take action on any demand: questions of nationality do not limit the powers of the State. If a partnership is not composed of nationals of the State, or if there is reason to believe that no important interests are at stake, the State can always refuse to intervene. In the case of joint-stock companies, it would also be fair to draw a distinction between the collective interests of the company and the individual interests of its members—a method which would not generally be applicable in regard to the protection of partnerships. Further, the determination of the State to which the right of protection belongs is connected with the establishment of the *rights* of the State in that connection in its relations with other States and does not concern the relations between the State and the company demanding protection—this latter relation being inherently incapable of international regulation. We are, therefore, in favour of the establishment of a general rule which will draw no distinction between partnerships and joint-stock companies.

IV. CONCLUSIONS

The principles set out above are to be regarded as a possible basis for rules on which codification may later be founded and which could be incorporated in international conventions. These rules are as follows:

1

The States parties to the Convention agree that the nationality of a commercial company shall be determined by the law of the contracting party under whose law it was formed and by the establishment of the actual seat of the company in the territory of the State in which the company was formed.

2

The determination of nationality in the above sense shall in no way affect the full right of the contracting States to make rules as to the formal and

material conditions governing the formation of commercial companies: such rules depend entirely upon the municipal law.

3

As between the contracting parties, the legal definition of the seat of a company shall be determined by the municipal law under which the company was formed.

Nevertheless, inasmuch as the seat of the company as defined by the terms of association must be connected with the country of formation, the contracting parties shall be free to regard a seat as fictitious and artificial if its connection with the territory, whether it be that of a contracting State or of a third State, is fraudulent and intended to evade imperative provisions of the applicable law or if the real and effective seat is not situated in the country of formation of the company.

Forfeiture of nationality ordered by one of the contracting States, on the ground of a fictitious and artificial seat, shall be recognised by the other contracting States. The legal effects of such forfeiture shall be determined according to the laws in force in the various contracting States, whose Courts and administrative authorities shall be competent to settle the penalties following thereon.

4

The test of the nationality of a commercial company laid down by the present Convention shall apply to its branches, agencies, and subsidiary and auxiliary establishments, provided that they do not possess autonomous or independent existence, even though they are situated outside the State of origin of the main company.

5

Voluntary changes of nationality by a commercial company shall be recognised as between the contracting parties, if they are in conformity with the law of formation of the company and if by a genuine transfer of its seat the company conforms to the law which will henceforth govern it and acquires a new nationality.

6

The right of diplomatic protection and intervention on behalf of commercial companies shall belong to the State of which they are nationals under the provisions of the present Convention.

7

Should a commercial company renounce in any form the right to invoke the diplomatic protection of the State to which it belongs, the renunciation shall in no way affect the powers of the protecting State in the matter.

8

The foregoing provisions shall apply to all commercial companies whatever be the legal form which they have assumed in conformity with the municipal law.

Nevertheless, the contracting parties expressly reserve the right to refuse to apply the above rules to foreign commercial companies which do not possess legal personality.

9¹

It is understood that no contracting State is obliged to apply the foregoing provisions to commercial companies formed under the law of States not parties to this Convention.

(Signed) S. RUNDSTEIN,
Rapporteur.

Warsaw, October 7th, 1926.

TEXT OF THE CONCLUSIONS MODIFIED AS THE RESULT OF
THE COMMITTEE'S DISCUSSION

1

The States parties to the Convention agree that the nationality of a commercial company shall be determined by the law of the contracting party under whose law it was formed and by the situation of the actual seat of the company which may only be established in the territory of the State in which the company was formed.

2

The determination of nationality in the above sense shall in no way affect the full right of the contracting States to make rules as to the formal and material conditions governing the formation of commercial companies: such rules depend entirely upon the municipal law.

3

As between the contracting parties, the legal definition of the seat of a company shall be determined by the municipal law under which the company was formed and its seat established.

¹ The recommendations of the Economic Committee of the League of Nations concerning the grant of the legal administrative, fiscal, and judicial guarantees necessary for nationals, firms or companies with a view to the promotion of economic co-operation between nations (see HOLIER, *Le Pacte de la Société des Nations*, 1926, pp. 439-441), include the following:

"Article 9.—It is agreed that nothing in the present Articles requires a State to grant their benefit to a company of which it can be proved that the financial control is in the hands of nationals of a State which has not accepted the present recommendations or of which the seat of control is situated in the territory of such a State."

Is there any need to revive the idea of "control"? We should not consider it desirable to recognise that, in case of retortion, a State not accepting the regulations as to nationality might itself apply the above-mentioned conception.

Nevertheless, inasmuch as the seat of the company as defined by the terms of association must be connected with the country of formation, the contracting parties shall be free to regard a seat as fictitious and artificial if its connection with the territory, whether it be that of a contracting State or of a third State, is fraudulent and intended to evade imperative provisions of the applicable law or if the real and effective seat is not situated in the country of formation of the company.

Withdrawal of nationality from a company, on the ground of a fictitious and artificial seat, shall be recognised by each signatory State in the measure in which judgments are reciprocally recognised and executed in the relations between the signatory States.

4

Branches, agencies and subsidiary and auxiliary establishments, provided that they do not possess autonomous or independent existence, have the same nationality as the main company, even if they are situated outside its State of origin.

5

(Suppressed.)

6

The right of diplomatic protection and intervention on behalf of commercial companies shall belong to the State of which they are nationals under the provisions of the present Convention.

7

Should a commercial company renounce in any form the right to invoke the diplomatic protection of the State to which it belongs, the renunciation shall in no way affect the powers of the protecting State in the matter.

8

The foregoing provisions shall apply to all commercial companies whatever be the legal form which they have assumed in conformity with the municipal law.

9

(Suppressed.)

OBSERVATIONS BY M. SCHÜCKING REGARDING M. RUNDSTEIN'S REPORT

I. While I agree with the principles laid down by M. Rundstein in his excellent report on the international rules applicable to the nationality of commercial companies and the right of affording them diplomatic protection, and while I endorse his conclusions as a whole, I venture to offer a few observations regarding some of the rules "to be regarded as a possible basis on which codification might later be founded and which would be incorporated in international conventions."

II. *Re Article 1* (see report, page 16).—Accepting M. Pillet's theory, M. Rundstein lays down a general rule that the tests for determining the nationality of a commercial company are: under what law was it incorporated, and where is its actual seat situated—the expression “seat” being defined in accordance with the law of the country in which the company was incorporated. I entirely agree with the proposed tests, which only restrict the freedom of States as regards the determination of the seat. The latter may be established only in the place where it should logically be situated (see Article 3). Though I share the Rapporteur's view and conclusion, I venture to point out that one of the two tests accepted, that is to say the expression “actual seat,” will require legal interpretation in every country.

Opinion is unanimous, in doctrine and case-law, that the actual seat is the place where the administrative business of the company is done. If the various administrative organs of a company are situated in the same country, there is no difficulty in determining that company's nationality. Disputes can only arise in cases—which are by no means rare—in which various important organs of the same company are situated in different countries. As Ernst ISAY rightly remarks in his monograph on the nationality of legal entities (“*Die Staatsangehörigkeit der juristischen Person*,” pages 105 *et seq.*), it may happen, for instance, that the board of directors and the general meeting of shareholders of a joint-stock company meet in different countries. Current opinion is often inclined to admit that in these cases the company possesses more than one “actual seat.” There is a general reluctance, however, to draw conclusions from this regarding the company's nationality. It cannot be concluded that a company possesses several nationalities merely because, as its organs meet in different countries, it may admittedly possess more than one seat. As, therefore, publicists and case-law agree that nationality is determined by the actual seat where the most important administrative business is done, the above considerations cannot affect the question of nationality, except in so far as they concern the existence of *one* actual and effective seat (Cf. MARBURG, “*Staatsangehörigkeit und feindlicher Character juristischer Personen*,” “*Völkerrechtliche Monographien*” hrsg. von SCHÜCKING, STRUPP und WEHBERG, Vol. 7, pages 27 *et seq.*). The Convention proposed by M. Rundstein, which endeavours to exclude double nationality, is therefore in harmony with doctrine and practice which recognise only one effective seat as a test for the question of nationality.

M. Rundstein fully foresaw that it would be difficult to give a clear and invariable definition of the term “effective seat—*siège social et effectif*” in international law. In his view, the legal definition of the term “seat” must be left to the municipal law under which the company was incorporated. Every State is, therefore, at liberty to decide, according to its own laws and legal practice, how it will interpret the words “effective seat—*siège social et effectif*” in the case of companies which have been incorporated under its laws. In all other cases States are bound to recognise the interpretation

given by the State in which the company was incorporated. Naturally his solution could not, when once embodied in an international convention, be superseded by any public regulation in force in one of the signatory countries.

Generally speaking, there is not likely to be any conflict of laws with regard to the interpretation of the expression "effective seat—*siège social effectif*" if the solution which M. Rundstein suggests is adopted. Nevertheless, difficulties may arise. There are many chronicled cases which show that the term will have to be interpreted in national and international case-law. ISAY (*op. cit.*) and MAMELOK ("Die Staatsangehörigkeit der juristischen Person") quote the well-known case in commercial law in which the board of directors or managing board of a joint-stock company meets in country A, whereas the general meeting of shareholders is convened in country B. Naturally, according to M. Rundstein's draft, a conflict of laws could only arise if the joint-stock company had been duly incorporated in the country in which the general meeting took place, and also in the country in which the board of directors or managing board met. According to prevailing opinion (which is, we think, right, because the "effective seat" should be situated at the permanent administrative centre), the "effective seat" is determined according to the seat of the board of directors or managing board.

An opinion which shows that international case-law might evolve in a different direction is expressed in judgment No. 7 of the Permanent Court of International Justice. Although this judgment is concerned with determining the place from which the "control" of a joint-stock company is exercised, the arguments, as put forward in support of this judgment, might be applied in the case of the effective seat as well as to control. The actual phraseology of the Court is as follows (page 69):

"The two organs of the Company which, according to the opposing contentions of the Parties, enter into consideration from the point of view of control, are the Board of Control and the General Meeting of Shareholders. Both of these organs in fact may, according to the circumstances, exert a decisive influence. Nevertheless, regard must be had, in the first place, to the shareholders, for, under German law as well as under other systems of legislation, it is the general meeting of shareholders which exercises the supreme power of the Company. From the General Meeting, which is the constituent body, directly emanate the powers of the Board and, directly or indirectly, those of the management."

I do not think we need exaggerate the importance of this controversy, seeing that in M. Rundstein's draft it is understood that every State shall be free to determine and define the expression "effective seat" according to its own legal or jurisdictional system. It is, of course, quite possible that a "trading company," which in reality forms one economic unit, might

be regarded as its own national by each of the two States in which it was incorporated, the formal test for determining the effective seat being different in the two States. Although the company would be an "economic unit" in fact, in form it would have to be regarded as two companies established in different countries. The difficulty for a third State would be to decide to which of the two companies—they together forming one economic unit—it should ascribe a given act. Not infrequently that third State's own conception of an "effective seat" would show it where and in what country it should look for the effective seat of a foreign commercial corporation subject juridically to its laws and jurisdiction.

Other cases may well be imagined, but they do not involve any fundamental difficulties. Certain trading companies might, for instance, be directed by managing boards in different countries, by *one single* meeting of shareholders, while they might, at the same time, have been incorporated in various countries. That, unless I am much mistaken, is the case with the Ottoman Bank, of which one of the two managing boards is in England, the other being in France. In this case a literal interpretation would lead us to conclude that there were two commercial companies with one general meeting of shareholders. The resolutions adopted by this meeting of shareholders are identical resolutions to be applied to the two commercial companies established in different countries.

Though Article 187 of the Portuguese Commercial Code may allow members of a joint-stock company established in a country in which the meeting of shareholders does not take place to convene special meetings of members, a conflict of nationality, as M. ISAY (*op. cit.*) foresees it, would not arise. The administrative centre of the commercial company as a whole is not affected by this provision, which is of purely national import.

But, if there are difficulties which have not been completely solved by the draft, national and international case-law will apply and interpret the expression "actual established seat" in a way which may one day lead to uniform interpretation and application. Unfortunately, as no international commercial law exists, we cannot hope to insert any more definite formula in an international convention on the nationality of companies.

In other domains of law, similar difficulties arise in connection with the uniform interpretation and application of rules of international law intended to protect internationally recognised interests. For instance, under customary international law, every State has the right to possess a flag. National legislation and practice cannot, however, be restricted by the principles of international law; indeed, they tend to establish rules which in their interpretation and application very frequently deviate from the principles evolved by international law (see LABAND: "*Das Staatsrecht des Deutschen Reiches*," 5th edition, Vol. 3, pages 265 *et seq.*).

Re Article 2.—With regard to the Rapporteur's suggestion in Article 2, I would venture to offer only one observation, namely, that M. Rundstein's

intention should, unless I am mistaken, be defined as follows: Article 2 refers to one only of the two tests established in Article 1, that is to say, it refers to the "formation of commercial companies." Consequently, we must conclude that this Article neither derogates from nor indeed affects the other test defined in Article 1 (actual seat), which continues to be the compulsory material test, although the contracting States will be entirely free to define the formal and material conditions which must govern the incorporation of commercial companies. Such an interpretation of Article 2 is in keeping with the provision of paragraph 2 of Article 3, which is really little more than the consequence of the "actual seat" test given in Article 1. Paragraph 2 of Article 3 refers to regarding a *seat* as fictitious and artificial. Only in this latter case are States entitled to disregard the compulsory material test as interpreted by the legislation and case-law of a contracting party.

Re Article 3.—Although I can fully approve paragraphs 1 and 2 of Article 3, I feel obliged to make certain reservations with regard to the principle laid down in paragraph 3. This provision is very far-reaching, because it allows *every* State to decree forfeiture of nationality on the ground that a company claims attachment to a given State; another legal effect of the provision is that such forfeiture must be recognised by all the other contracting States, even by the State which regards the company as possessing its nationality. Certainly a provision which allows each State to decree forfeiture of nationality on the ground that the company claims to possess a fictitious and artificial seat in its territory seems to be quite in agreement with one of the fundamental conceptions of international law: the legislative and administrative autonomy of each State. Moreover, a provision which lays down that this forfeiture of nationality shall be recognized in all the contracting States may be justified if the forfeiture is decided by the State to which the company claims to have submitted its articles of incorporation and in which it claims to have established its actual seat, or by the State to which the company has not submitted its articles but claims to be attached by reason of the situation of its actual seat.

The legal conception that the withdrawal of nationality in all the contracting States may be ordered if it has been decreed by the State to which the company claims to have submitted its articles of incorporation and in which it has established its actual seat was accepted by the Courts of various countries when trading companies in Russia were nationalised. For instance, there is a decision of the Tribunal de la Seine dated May 12th, 1925 (*Compagnies d'Assurances réunies l'Union et "Le Phéass espagnol" v. Sverinoie Strashovoie Obshchestvo*); and a decision of the Swiss Federal Tribunal of December 10th, 1924 (*Banque Internationale Commerciale de Péetrograd v. Hausner*). (Cf. on this point WOHL: "*Die Nationalisierung der Bankaktiengesellschaften in Sowjetrussland und ihre Rechtswirkung im Ausland*." Ostrecht, T. I., pages 26 *et seq.*).

This provision in Article 3 of the draft allows, as I have said, too wide an

application of the discretionary power of each State to order forfeiture of the nationality of commercial companies. According to the text of the draft, every State could oblige all the other contracting States to recognise the forfeiture so ordered. The draft, moreover, will lead to differences of opinion regarding the consequences of forfeiture. Would the consequence of ordered forfeiture be a simple recognition of the fact that such forfeiture had occurred within the jurisdiction of the State which ordered it, or would the juridical effects of such action necessarily result in the complete dissolution of the company? As the legal consequences of the *res judicata* pronounced by administrative and civil courts are not, under international administrative law and the international law of procedure, solely governed by the rules of international law, every country may, on the basis of its own laws and practice, define the juridical consequences of a foreign judgment for the forfeiture of nationality on the ground of a fictitious and artificial seat. Case-law in the various countries has arrived at very different conclusions regarding the recognition of a *res judicata* pronounced by a foreign court, nor are the conditions under which a foreign judgment is validated by any means uniform (see, for instance, A. CAVAGLIERI, "La cosa giudicata e le questioni di stato," Padova, 1909). To obtain a uniform result in all the countries which sign a convention on international rules to govern the nationality of commercial companies, it is absolutely essential that the "draft convention concerning the recognition and execution of judicial decisions," which was drawn up as a specimen "standard-treaty" at the Fifth Hague Conference on Private International Law, 1925, should come into force in these countries (see "Acts," pages 97 *et seq.*, "Documents," pages 459 *et seq.*).

I am in favour of greatly reducing the scope of the rule proposed by the Rapporteur in paragraph 3 of Article 3. I think that forfeiture of nationality should not entail material consequences in the other contracting parties, and should only be "recognized" by them if the forfeiture is decreed by the State to which the company has submitted its articles of incorporation and to which it claims to belong because its actual seat is situated in that State, or by a State to which the company has not submitted its articles of incorporation but to which it claims to belong because its actual seat is situated in that State.

Such a rule will make adequate provision for the case in which a foreign judgment exceeds the limits of the Convention. In such case the foreign judgment should not be recognised by the other States. According to Article 1, paragraphs 1 and 2, of the Draft (Hague) Convention, "the force of legal decisions . . . shall be recognised in the other State . . . that, in the dispute in question, the international rules on jurisdiction admitted under the law of the State in which the decision is invoked shall not exclude the jurisdiction of the other State; that recognition of the decision shall not be contrary to public order or to the principles of public law in the State in which the decision is invoked."

At the same time, I would also express a hope that it will become an international and uniform practice for States to sign the Convention regarding the recognition and execution of judicial decisions. That is necessary if they wish to settle internationally the effects of the recognition of an actual seat and the forfeiture of an artificial and fictitious seat of a foreign commercial company.

Re Article 7.—With regard to Article 7, I would venture to point out that this article merely gives expression to a rule universally admitted in the doctrine of international law. As the exercise of the right of diplomatic protection is an expression of the discretionary power of a State, it cannot be limited by the will of a third personality who is not a subject at law in international law.

This rule of law is even applicable to the personality on whose behalf the right of protection is to be exercised. It would not, therefore, be necessary to embody a universally accepted principle like this in a Convention the object of which is not to define the general law of diplomatic protection, if difficulties had not actually arisen in practice, as the Rapporteur points out on pages 13 *et seq.* In view of these difficulties, it would perhaps be desirable to insert Article 7 in a future Convention.

Re Article 8.—The provision in paragraph 2 of Article 8 seems to me to restrict the principle enunciated in paragraph 1 of Article 8. If they are allowed to make the rules regarding foreign commercial companies apply only to commercial companies which possess juridical personality, States whose laws admit of no companies other than those enjoying juridical personality will receive greater protection under the Convention than States whose laws admit commercial companies not possessing juridical personality. The conception expressed in paragraph 2 of Article 8 is also in contradiction with modern doctrine and recent decisions in commercial law, the tendency of which is to apply, as far as possible, uniform rules to all commercial companies (see in this connection WIELAND, *Handelsrecht*, page 434: "Die Bezeichnung Handelsgesellschaft ist nicht ein blosser Sammelname, sondern begrifflicher Mittelpunkt sämtlicher unter diesem Ausdrucke zusammengefasster Vereinigungen zum Zwecke gemeinsamen Handelsgewerbebetriebes"). I therefore think that the second paragraph of Article 8 should be omitted.

Indeed, the idea contained in paragraph 2 of Article 8 is not upheld by the Rapporteur himself. On page 10 of his report, he rejects all tests for determining the nationality of the person by the nationality of the associated individuals. I also feel that it would not be desirable in a Convention the object of which is to formulate international rules regarding the nationality of commercial companies (and not that of legal entities) to draw a distinction between legal entities and other commercial companies. They should be regarded from one angle only.

Re Article 9.—As the proposed Convention will only be binding on the contracting parties, I do not think it necessary or desirable to insert a special

provision expressly stating that the Convention shall not apply to commercial companies formed under the law of States not parties to the Convention.

(Signed) SCHÜCKING.

M. RUNDSTEIN'S COMMENTS ON M. SCHÜCKING'S OBSERVATIONS

[Translation.]

Before venturing to offer a few comments on M. Schücking's observations, I should like to tender my sincerest thanks to our distinguished colleague, whose clear and lucid criticism has so largely contributed to the settlement of difficult and controversial points. I, too, will endeavour to explain some passages in my report which might lead to misunderstandings and ambiguity.

1. I still feel that the case of a company having several "seats" or a plurality of organs (more than one board of directors in the form of "managing boards") does not in any way affect the fundamentals of the main test of nationality (Article 1 of the draft). As M. Schücking rightly observes, we can admit that a company possesses more than one seat without concluding that it possesses several nationalities. Since, then, there is no danger of such a conflict, I think that the test which couples the law of the company's incorporation with the establishment of its actual seat in the territory of the State in which it was incorporated would eliminate the possible application of a law not in harmony with this definition; "additional" seats would be subordinated to the "principal seat" (*cf.* the observations of M. HATSCHEK, *Völkerrecht*, 1923, pages 217, 218, "Massgebend ist also der Gesichtspunkt, ob das Gründungstatut die Zugehörigkeit der juristischen Person zu Staate dadurch bestimmt, dass es den Sitz der juristischen Person bestimmt").

Certainly, the view which has repeatedly been adopted by French doctrine and practice regarding the "elected domicile—*domicile élu*" of a commercial corporation cannot be held to be reasonable (*cf. in re* West Canadian Collieries Limited, Lille Commercial Court of May 21st, 1908, and *in re* the Huelva Central Copper Mining Company, judgment of the Court of Appeal dated July 6th, 1914, and SURVILLE—*Cours élémentaire de droit international privé*, 1925, page 724). International rules could not accept this view of the Courts that, by conforming to a given country's laws, a company could elect to have its "seat" elsewhere than in the country to which it has always been attached by its origin and its incorporation.

I do not deny that there are certain "pathological" cases: for instance, the "Grande Compagnie de Suez" possesses a nationality other than that of the country under whose laws it was incorporated; the Morocco State Bank was created in 1906 in accordance with French law, but its official seat and administrative centre is in Tangier (*cf.* also the case of the "Deutsch-Niederländische Telegraphengesellschaft," *Cuq*, page 26), but these abnor-

mal cases are the result of exceptional circumstances, and in many cases it is diplomatic conventions which have decided what law is to apply, ignoring the concordance which should exist between the *lex constitutionis* and the actual seat.

2. In his observations, which throw much light on the subject, Professor Schücking raises very serious objections to the wording of paragraph 3 of Article 3 of my draft, producing many apposite quotations in support of his view.

I would wish first of all to say that, by the international recognition of forfeiture, I mean merely the recognition and registration of the "decease" of a company which has been acting fraudulently; the legal effects of such forfeiture will depend entirely on the provisions of the municipal law of each country and will not prejudice the general recognition of measures ordered by the competent authorities.

I agree with Professor Schücking that the question of forfeiture is intimately bound up with the recognition and execution of judgments delivered by foreign courts; but I do not see that there will be any contradiction with the draft of the fifth Hague Conference (Article 1, paragraph 1) if the various States recognise the jurisdiction of one of their number (solely, of course, in the case of a fictitious and artificial seat) and, by so doing, recognise the forfeiture which has been lawfully decided and ordered by the Courts. This is not a case of disregarding the rules of international jurisdictional competence, because such competence will be recognised reciprocally.

The main question depends upon how the following problem is solved: Should a commercial corporation having a fictitious seat be held to have forfeited its juridical personality and be consequently non-existent (1) in the country of origin? (2) in the country in which it has been established in defiance of the law? (3) in third States? (See the Netherlands Government's Questionnaire No. 5, on a draft Convention concerning Foreign Legal Entities: Preliminary documents I—Sixth Session of the Hague Conference on International Private Law).

I am of opinion that, in formulating international rules, we could not be satisfied with the exclusive jurisdiction of the country of origin. Suppose a company were incorporated in Great Britain in order to avoid some material provision of French law. Its "seat" in London is fictitious; its real administrative centre is situated in Paris and the Board of Directors, all of whom are Frenchmen, meets in Paris. The French courts say that the company is—in spite of its "English" form—really a French company, and they therefore order its liquidation and dissolution (see the case of the *Société du Moulin-Rouge* in Paris, PILLET-NIBOYET, page 304).

Could we admit that this company would still be in existence in England, and that "French" forfeiture would have no legal effects outside French territory, when fraudulent practices have been proved in the French Courts and these Courts have declared the company to be non-existent, with the

immediate effect that the company ceases to be a corporate body, or in other words forfeits its juridical personality? The company in question possessed no property in London, had no offices there (that is to say, an administrative centre in the strict sense), its "seat" was really the office of an obliging solicitor who accorded it his very suspect hospitality. Would a decision of the British Courts be the only way to establish the exclusive and general recognition of this forfeiture? Should not the interests of the State in which a company really transacts business and desires to transact business, in spite of its foreign form, prevail? Should the decision of the Courts of that State have only a strictly territorial application? That is the main problem which renders the solution to be adopted by our Committee a matter of considerable importance.

Parallelism is not always a sound argument, and I only venture to draw attention to the provisions of a draft Convention prepared by the Institute of International Law on the Legal Status of International Associations (Year-Book, Vol. XXX, page 385 *et seq.*), Article 18 of which refers to forfeiture, subject to the implied reservation that the legal situation is not analogous and the forfeiture referred to in this Article 18 is not concerned with *fraus legis*.

3. As regards paragraph 2 of Article 8 of my draft, I am of opinion that some reservation on these lines will be desirable. Certain countries might ask that the nationality of companies not possessing juridical personality should be treated on a different footing, for instance, when it is a question of acquiring immovable property.

(Signed) S. RUNDSTEIN.

LEAGUE OF NATIONS

Work of the Committee of Experts for the Progressive Codification of International Law

RESOLUTION ADOPTED BY THE COUNCIL ON JUNE 13TH, 1927: REPORT PRESENTED TO THE COUNCIL BY THE POLISH REPRESENTATIVE AND MINUTES OF THE PROCEED- INGS IN THE COUNCIL*

Note by the Secretary-General.

On June 13th, 1927, the Council considered the reports drawn up for submission to it by the Committee of Experts for the Progressive Codification of International Law at the Committee's third session held at Geneva in March-April, 1927, together with a letter dated April 2nd, 1927, from the Chairman to the Secretary-General, and adopted the following resolution:

"The Council of the League of Nations,

"Having considered the reports drawn up for submission to the Council by the Committee of Experts for the Progressive Codification of International Law at its third session held from March 22nd to April 2nd, 1927, and the letter from the Chairman of the Committee to the Secretary-General dated April 2nd, 1927.

"Decides to transmit the above-mentioned documents and the report thereon of the Polish representative, as adopted by the Council at its meeting on June 13th, together with the Minutes of that meeting, to the Assembly and to place the consideration of these documents and report upon the agenda of the Assembly."

The present document reproduces below the report of the Polish representative, as adopted by the Council, and the minutes of the Council's proceedings.

The other documents referred to in the resolution of the Council were circulated to the Governments of the Members of the League and other Governments at the same time as they were communicated to the Council and will be placed by the Secretariat at the disposal of the delegates at the Assembly. The complete list of these documents is as follows:

1. Questions which appear ripe for International Regulation.
2. General Report on the Procedure to be followed.
3. Procedure to be followed with regard to the Question of the Procedure of International Conferences and the Procedure for the Drafting and Conclusion of Treaties.
4. Procedure to be followed with regard to the Question of the Products of the Sea.

* Publications of the League of Nations. V. Legal. 1927. V. 15.

5. Recognition of the Legal Personality of Foreign Commercial Corporations.
6. Nationality of Commercial Corporations and their Diplomatic Protection.
7. Letter dated April 2nd, 1927, from the Chairman of the Committee to the Secretary-General reporting on the Work of the Third Session of the Committee, held in March-April, 1927, and communicating to the Secretary-General various Questionnaires and a Report for transmission to Governments.

The four questionnaires referred to in the section of the Polish representative's report entitled "Present Programme of the Committee" were communicated to the Governments by the Secretary-General with his circular letter No. C. L. 57. 1927. V. dated June 7th, 1927.

REPORT OF THE POLISH REPRESENTATIVE, M. ZALESKI, APPROVED BY THE COUNCIL ON JUNE 13TH, 1927¹

Terms of Reference of the Committee

The Committee of Experts for the Progressive Codification of International Law was appointed by the Council in compliance with a resolution adopted by the Assembly on September 22nd, 1924, which laid down the Committee's terms of reference. The resolution was as follows:

"The Assembly:

"Considering that the experience of five years has demonstrated the valuable services which the League of Nations can render towards rapidly meeting the legislative needs of international relations, and recalling particularly the important conventions already drawn up with respect to international conciliation, communications and transit, the simplification of Customs formalities, the recognition of arbitration clauses in commercial contracts, international labour legislation, the suppression of the traffic in women and children, the protection of minorities, as well as the recent resolutions concerning legal assistance for the poor;

"Desirous of increasing the contribution of the League of Nations to the progressive codification of international law;

"Requests the Council:

"To convene a Committee of Experts not merely possessing individually the required qualifications but also as a body representing the main forms of civilisation and the principal legal systems of the world. This Committee, after eventually consulting the most authoritative

¹ Document C. 254. 1927. V.

organisations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

"(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;

"(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

"(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution."

Reports presented by the Committee to the Council

At its present session, the Council has before it a report from the Committee recommending seven subjects as being, in certain of their aspects, sufficiently ripe for discussion in international conference; a general report on the procedure which might be followed to prepare for such conference; and two reports on special procedure recommended with regard to two particular subjects. It has also before it a letter from the Chairman of the Committee to the Secretary-General which shows the manner in which the Committee is continuing its work, and two reports explaining why the Committee is not proposing to consult Governments upon two subjects which it considers to merit attention. These seven documents have been communicated to the Council with the Secretary-General's memorandum of May 30th, 1927.¹

It is now for the Council to consider the Committee's reports and to form its conclusions as to further action.

Nature of the Initiative taken by the Assembly and of the Committee's Mandate

Before discussing the action which might now be taken in further execution of the Assembly's resolution, it may be desirable that I should say a few words as to the nature of the initiative which was taken by the Assembly in 1924 and the character of the work which has been entrusted to the Committee of Experts. There is a certain danger that the League's attitude in the matter, and the very interesting results achieved by the Committee, may be exposed to mistaken criticism arising from misunderstanding of the nature of the problem towards the solution of which we are attempting to contribute and of the exact character of the contribution which the Assembly has considered it possible to make.

In adopting its resolution of September 22nd, 1924, the Assembly desired

¹Document C. 253. 1927. V. This memorandum which merely informed the Council what were the documents to be considered by it, is not reproduced.

to make a contribution towards meeting a demand, which is widely spread, for the progressive development and consolidation of written law to govern the relations between States. This demand commonly expresses itself as one for the "codification of international law," and homage to this mode of expression is rendered by the title which has been given to the League's Committee; but the expression is not a strictly accurate one and it is liable to cause misconceptions. The actual terms of the Assembly's resolution furnish no justification for thinking that that body considered that any single initiative, or the work of any single body of experts, could be expected to result in the formulation of a corpus of written law governing the more important relations between the members of the international family. On the contrary, the resolution recognises that the establishment of positive rules of law in international relations must be a gradual process, to which contribution is made from every side as the need is felt and the possibility of action presents itself.

The resolution calls attention in its preamble to a fact which is too often ignored in this connection, namely, the immense contribution which the League has made and is continuing to make towards the end in view through its technical organisations and technical conferences, and which, in the field of labour legislation, is made by the International Labour Organisation. The establishment of the League and the Labour Organisation has in fact created a new and powerful machinery which, in the words of the Assembly's resolution, renders enormous services "towards rapidly meeting the legislative needs of international relations." The activities of the League and Labour Organisation in connection with the conclusion of technical conventions are, of course, only a continuation, through a specially convenient and world-wide organisation, of an activity which had been carried on since early in the last century, and which had already resulted in the regulation of many matters of practical international interest (communications, literary, artistic and industrial property, public health and so forth) through the formation of international unions, whose members co-operated in accordance with rules laid down by the convention establishing the union.

I should add that the more fundamental general questions of international law, which underlie the graver international disputes, questions of the rules and the procedure which should be applied to settle conflicts between the vital activities and interests of States, are constantly under consideration and, I hope, are continually being brought nearer final solution, under the provisions of the Covenant, by the political work of the League, both in its treatment of actual disputes and its discussions of such questions as pacific settlement of disputes and disarmament, and last, but not least, by the work of the Permanent Court of International Justice.

The resolution also expressly recognises the importance of the initiative taken by Governments which are traditionally interested in some particular branch of international law. I may mention the activities of the Nether-

lands Government, which not merely enjoys the distinction of having convened the two great Peace Conferences of 1899 and 1907, of whose work the League is in some sense the direct continuer, but which, since more than a quarter of a century, has been continuously active in the field of private international law and has to its credit the holding of a whole series of successful conferences, which, I now understand, it has converted into a permanent machinery for dealing with this branch of the law. I must mention also the long-established and fruitful activities of the Comité maritime international and the Belgian Government in the field of maritime commercial law.

One must not forget either the great services which various Governments (I may mention, for example, those of Switzerland, France, Belgium and Italy) render through the organisation in their territory, and often with the assistance of their national authorities, of the central bureaux of the various international unions. In this connection, too, one naturally thinks of the interest which has so long been displayed by the nations of the American continent in the development of common principles to regulate their mutual relations. This movement took concrete shape so far back as 1902 and is resulting, in the present year, in the meeting of a Committee of Jurists appointed by the interested Governments to consider a number of draft conventions prepared by the American Institute of International Law at the request of the Governing Board of the Pan-American Union.

Finally, a tribute is paid by the resolution to the valuable work of the international scientific organisations, such as the Institute of International Law, the International Law Association and others, which have so long devoted themselves to the study and improvement of international law.

Since the date of the Assembly's resolution, the generosity of the Italian Government has placed at the service of the League and of the world a further institution—the International Institute for the Unification of Private Law—for the purpose of facilitating the treatment of questions relating to the unification, assimilation and co-ordination of private law as between States or groups of States.

The Assembly would no doubt have performed a popular act if it had disregarded the real nature of the problem presented by the aspiration for the codification of international law, and the importance and extent of the existing agencies through which the needs of nations for the development of rules governing their mutual relations are already being gradually met, and had sought to put the League in the position of an organisation which proposed forthwith to secure the regulation of international relations in general by fixed and written rules, *i.e.*, the immediate codification of international law. In fact, the Assembly took the much more modest decision to employ a Committee of Experts to advise as to whether there were any questions of international law, not forming the object of existing initiatives, in regard to which the conclusion of general agreements could be considered to be

immediately desirable and realisable. The work of the Committee shows that this moderation was well judged. Although it has recommended seven subjects as ripe for the conclusion of international agreements, it will be seen that, in several cases, it is only certain aspects of the subject on which agreement is considered realisable and, with some possible exceptions, the matters with which the Committee proposes to deal are not matters in regard to which dangerous international disagreement is likely to result from existing doubts as to the applicable rules.

Tribute of Thanks to the Committee

In the second place, before considering what steps to take in regard to the Committee's reports, I am sure the Council will desire to manifest, on behalf of the League, its appreciation of the great zeal, care and learning with which the Committee has addressed itself to the difficult task entrusted to it. The League owes a debt of gratitude to the Chairman, members and rapporteurs of the Committee to which I would wish to give the most sincere expression.

I desire also to thank the Committee for having decided to place its Minutes, which have hitherto been confidential and restricted to use by the members of the Committee, at the disposal of the Council. I propose that in these circumstances the Minutes of this year's session should be printed, as the Council will then possess a full printed record of the Committee's proceedings.

Questions recommended as Ripe for International Agreement

Turning now to the proposals of the Committee, the Council has, in the first instance, to deal with its recommendation that seven subjects are, in certain of their aspects, ripe for regulation by international action.

These seven subjects may be divided into two groups:

There is, in the first place, a group of five important subjects which, according to its general report on procedure, the Committee considers might be the subject of an international conference or conferences after the necessary additional preparatory work has been performed. These subjects are the following:

1. *Nationality*.—Those aspects of the subject which are dealt with in the draft convention prepared by M. Rundstein and included in the Committee's Questionnaire No. 1 (Section V).

2. *Territorial Waters*.—Those aspects of the subject which are dealt with in the draft convention prepared by M. Schücking and included in the Committee's Questionnaire No. 2 (Section IV).

3. *Diplomatic Privileges and Immunities*.—Those aspects of the subject which are set out in the Committee's questionnaire and discussed in M. Diena's report.

4. *Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners*.—Those aspects of this subject which

are dealt with in the conclusions of M. Guerrero—Section IV of the Committee's Questionnaire No. 4.

5. *Piracy*.—Those aspects which are dealt with in the draft provisions for the suppression of piracy drawn up by M. Matsuda and printed at the end of the Committee's Questionnaire No. 6.

Question of Procedure: Proposed Reference to the Assembly

It is necessary to point out that the Committee, confining itself quite properly to the strict terms of its mandate, has not, on any of these subjects, recommended specific proposals for inclusion in the contemplated international convention, but has merely reported that in its opinion various aspects of these subjects indicated by it are susceptible of being ultimately regulated by international conventions. The Committee has in fact most carefully guarded against the supposition that it has given the weight of its authority to any of the detailed suggestions for the solution of particular questions which have been made by its rapporteurs. Furthermore, although the Committee has been remarkably successful in obtaining the views of Governments in reply to its questionnaires, and the various Governments which have replied have shown a most welcome desire to further in every way the success of the initiative taken by the Assembly, it is noticeable that, in regard to every subject, most Governments have not yet given any detailed expression of their views as to the provisions which might be inserted in an international convention to solve the various questions raised by the Committee.

It is clear, therefore, that we have not at present before us material which is ripe for immediate consideration in an international conference or conferences.

On the contrary, the Committee, in its general report on procedure, indicates that heavy preparatory work must be done, either on the basis of the Committee's own questionnaires and its rapporteurs' proposals or otherwise, before the actual conference or conferences can profitably be convoked.

In my opinion, the positive and satisfactory result which has been achieved is that it has been shown to be possible to contemplate holding successfully a conference or conferences to deal with some at least of the questions to which the Committee has called attention. Since the active collaboration of all the Members of the League is necessary for this next step, since any expenses involved for the League must be met by a vote of the Assembly, and also for the formal reason that the Assembly has not asked the Council to convene conferences as the result of the Committee's work, it appears to me proper to regard the question of convening conferences, and the question of the methods by which their work is to be prepared, as questions for decision by the Assembly. The Council will therefore, on this view, transmit the Committee's recommendations to the Assembly with any suggestions which it thinks it desirable to make.

The first question which arises for decision is whether the attempt should be made to deal simultaneously with all of the matters recommended by the Committee of Experts and the closely related question whether one or more conferences should be contemplated.

There are many considerations in favour of holding a single conference to deal with as many subjects as possible.

This is the proposal made by the Committee in its general report. It points out that attending international conferences imposes a certain burden upon Governments, and that it might be an economy from their point of view to hold a single conference, which could divide itself into sections for the consideration of different subjects and would be attended by delegations including the necessary experts for each subject. The Committee also points out that the holding of a single general conference would give greater satisfaction to the public interest in the question of codification than the convening of a number of separate conferences of a more limited scope.

If the solution of a single conference is adopted, however, it becomes a question whether the programme would not be over charged if all the subjects recommended by the Committee were taken up.

It is also clear that these subjects are not merely different in character but are also not all of equal importance.

It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.

Somewhat similar considerations apply to the question of Diplomatic Privileges and Immunities, which is also hardly an urgent question. In any case, if this subject is to be dealt with, I feel doubt as to whether the topics mentioned at point B of the Committee's questionnaire, namely the scope of diplomatic privileges and immunities under Article 7 of the Covenant and in connection with the Permanent Court of International Justice, is really suitable for consideration by an international conference which (it is hoped) will be attended by important States not belonging to the League of Nations. I venture to think that, while any general agreement on the subject of diplomatic privileges and immunities ought to be negotiated with due regard to its effect upon the application of Article 7 of the Covenant, the question of the application of the article ought not to be on the agenda of a general conference, but should be left to be dealt with by the Council and Assembly, the Permanent Court and the Governments whose interests are more particularly concerned in the proper application of the article. As a matter of fact, as regards the League, it will be remembered that, last year, the Council had before it certain difficulties between the Swiss Government

and the organisations of the League established at Geneva and that a *modus vivendi* was negotiated, and was approved by it, which is working with satisfaction to all concerned. A satisfactory *modus vivendi* is, I understand, in operation between the Permanent Court established at The Hague and the Government of the Netherlands. There appears to be no need for re-opening questions which have thus happily found a practical solution.

My conclusion is that limitation of the scope of the contemplated general conference might take the form of the exclusion of the subject of Piracy and possibly also that of Diplomatic Privileges and Immunities.

Method of convening Conferences

I come now to the question of the method of convening the conference or conferences and of arranging for the necessary preparatory work. Some public disappointment will, I fear, be caused if action is too long postponed. It would be satisfactory if the conference could meet not later than 1929. The course adopted may reasonably be influenced by this consideration.

There appear to be two possibilities.

One course would be for the Assembly to request the Council to convene the conference under the auspices and at the expense of the League, when it was satisfied that the preparatory work was completed. It cannot be ignored, however, that the League's programme of work is very full, more particularly in connection with the question of disarmament, which is one of the main duties allotted to it by the Covenant, and that there will be very heavy calls upon its resources in the immediate future.

The alternative would be for the Conference to be convened by a Government. Should, for instance, a particular Government, possessing a traditional interest in the advancement of international law and the special experience necessary for the task, desire to give its assistance, I see no reason why the Assembly should not invite it to convene the conference as the mandatory of the League, that is to say, at the express invitation and with the full support of the League and with the assistance which it might require from the Secretariat and the technical organisations of the League. I assume that at such a conference the various organs of the League could, so far as necessary, be represented in an appropriate manner, and that the Government concerned would be happy to pay the fullest regard to the views of the Members of the League on questions of procedure. This course, by which one of its Members would act for the League at the League's request, could not be regarded as implying in any way that the Assembly desisted from the initiative taken by it in 1924 or that the League was ceasing to interest itself in the development of international law.

The matter is one for decision by the Assembly, which alone can appreciate what work the existing engagements of the League and its resources permit it to assume in the near future.

Arrangements for Preparatory Work

The arrangements made for the preparatory work must depend largely upon the solution of the question who is to convene the conference. A Government which accepted an invitation to convene a conference might naturally wish that the control of the preparatory work should be in its own hands. But the Assembly would doubtless desire the Secretariat and the League's technical organisations to afford all the assistance in their power and would vote any credits necessary to enable this assistance to be given. Should, on the other hand, a conference be convened by the Council, that body should control the preparatory work. It would be necessary to consider whether this work could be entrusted to the Secretariat or whether it would not be desirable to set up one or more small committees of experts, possibly one for each subject, to perform the work with the assistance of the Secretariat.

Some valuable suggestions as to the nature of the preparatory work are made by the Committee of Experts in its general report on procedure. I should like to lay stress upon two points. In the first place, the League's experience suggests that the work of a conference is most likely to be successful if the delegates have before them a draft convention, or at least a draft series of proposals, which appears *prima facie* likely to secure a large measure of general agreement and which can be dealt with by amendment, omissions or additions. It may, of course, be the case that on some subjects a general exchange of views and discussion of general principles is all that is attainable in the first instance. My second point is that it is prudent to aim in the first instance at an agreed statement of the existing law, *i.e.*, at a codification of the existing views and practice of Governments, or at least that we should start by ascertaining what such views and practice are and make them the basis of the work of the conference. As I stated above, however, and as the Committee of Experts points out in its general report, we do not possess a considered statement of the views and practice of even the majority of Governments on any of the questions recommended for consideration by the Committee. Accordingly, I venture to think that the first stage in the preparatory work, whether it is undertaken by a Government or by the League, should be to inform the Governments that they will be invited to attend a conference and to request them to submit individually full statements of what, in their opinion, is the existing international law and practice on each of the points to be dealt with. The body charged with the preparatory work would have the task of comparing these statements and of seeking to present to the conference a draft convention or series of propositions which would embody in a suitable form the views generally accepted, would distinguish the divergent views on points on which such agreement was not apparent and would, naturally, set out any changes in the existing law which any Government thought it desirable to propose.

I feel that, in dealing with public international law, it is desirable to impose upon all the Governments the responsibility, and to give them the opportunity, of stating fully what they consider to be the present state of the law. The nature of the subjects to be dealt with makes me feel that this procedure is perhaps preferable to the alternative and more usual procedure of inviting replies from the Governments to a number of detailed questionnaires. Moreover, in the present case, having regard to the general interest and political importance of the questions involved, the framing of appropriate questionnaires, which would give the Governments full scope to express their views, would be excessively difficult, either for an individual Government or for the Secretariat or an expert committee.

Special Procedure in regard to Two Subjects

There remain two subjects which the Committee of Experts recommends as ripe for consideration but in regard to which it recommends a special procedure. These are:

- (a) *The Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties* (Questionnaire No. 5); and
- (b) *Exploitation of the Products of the Sea* (Questionnaire No. 7).

On the first of these subjects the Committee does not propose that an obligatory body of rules should be drawn up and, indeed, it is difficult to see how it can be possible or desirable to limit in advance the method in which conferences conduct their business or to deal in a convention with methods of concluding and drafting treaties.

The Committee proposes that the subject should be referred to a small committee of experts and that, if the appointment of a special committee should appear to involve too great expense, the committee might be composed of officials of the Secretariat. The results of a study by such a body of experts might, it is suggested, be of assistance in the conduct of conferences and the negotiation of treaties.

As the matter is in no sense urgent, and does not appear of sufficient importance to warrant asking the Assembly at the present moment to vote the credit necessary for the appointment of a special committee, I suggest that the Council might ask the Secretary-General to consider whether, in his opinion, the Secretariat could with advantage produce a study of the methods of conference and the methods adopted in making treaties, which might possibly be subsequently submitted to criticism by international organisations and Governments having special experience of the holding of general conferences. The Council will doubtless be prepared to reconsider the whole question when the Secretary-General has had time to form his opinion as to the desirability of undertaking this work.

The question of Exploitation of the Products of the Sea is the question of protecting valuable fauna of the deep sea against extermination by uneco-

conomic exploitation. The Committee of Experts has satisfied itself that there is, *prima facie*, a need and a demand on the part of Governments for international protection of such fauna but, being a committee of lawyers, it has naturally not been in a position to advise as to the technical possibilities of international action in this matter.

It recommends that an international conference of technical experts and jurists should consider the whole question and the possibility of action by way of bilateral or general conventions, dealing particularly with certain points set out in the Committee's report. It proposes that the preparatory work for this conference should be done by the Economic Committee of the League of Nations or by the Permanent International Council for the Exploration of the Sea at Copenhagen.

It is clear that the Council has before it very little information with regard to this subject, and I do not feel that we can at the present stage recommend the Assembly to take a decision in favour of convening even a technical conference. The natural course, subject to the Assembly's approval, would in my opinion be for the section of the Codification Committee's main report which deals with products of the sea, and its special report on procedure in this matter, to be referred to the Economic Committee of the League with the request to invite the collaboration of the International Council at Copenhagen and any other international organisations specially interested in the subject, and to advise the Council as to whether any action in the matter is possible and desirable.

Subjects with which the Committee does not propose to proceed

I have now to mention the two reports by which the Committee informs the Council that there are two matters which it would have placed upon its list of subjects meriting consideration, and have made the subject of questionnaires to the Governments, if it had not found that the Netherlands Government had placed them upon the agenda of the Private International Law Conference at The Hague. These subjects are:

- (1) *The Nationality of Commercial Corporations and the Determination of the Question to what State the Right of affording them Diplomatic Protection belongs; and*
- (2) *Recognition of the Legal Personality of Foreign Commercial Corporations.*

The Council can, I think, only approve the Committee's action. Its reports containing the interesting studies made by its rapporteurs have been communicated to the Members of the League as well as to the Council and will be at the disposal of the Netherlands Government and of the other Governments to which it may be hoped they will be of service in connection with the discussions at the Hague Conference.

Present Programme of the Committee

It remains, in conclusion, to consider the information as to the future work of the Committee of Experts which is before the Council in the letter addressed to the Secretary-General by the Chairman of the Committee under date April 2nd, 1927.

It will be observed that the Committee is sending questionnaires to the Governments on four new subjects, namely:

- (a) *Communication of Judicial and Extra-judicial Acts in Penal Matters;*
- (b) *Legal Position and Functions of Consuls;*
- (c) *Revision of the Classification of Diplomatic Agents;*
- (d) *Competence of the Courts in regard to Foreign States.*

The Committee asks that the replies of the Governments may be sent in by the close of the present year and proposes to hold a session in 1928 to consider these replies and report to the Council as to whether any of the subjects are ripe for international action.

The Committee has also carried over to the programme of its 1928 session three questions which it has referred to sub-committees but on which it has not yet consulted the Governments, namely:

- (a) *The Question of the Application of the Notion of Prescription in International Law;*
- (b) *The Question of the Legal Position of Private Non-profit-making International Associations and of Private International Foundations;*
- (c) *The Question of Conflicts of Laws on Domicile.*

In addition, therefore, to the seven subjects upon which it has recommended action, and the two subjects with which it has decided not to proceed on the ground that they form the object of an initiative taken by the Netherlands Government, the Committee has already before it seven further subjects of greater or less importance which it considers, *prima facie*, to merit attention and which it may ultimately recommend as ripe for international agreement.

On the other hand, the Committee has abstained from selecting new subjects for examination, while expressing its willingness to resume the selection of new subjects at its next session, if so desired.

I have no doubt that the Assembly, with which the decision rests, as it is a question of voting the necessary credit, will cordially desire the Committee to hold the session contemplated for 1928 for the purpose of completing the work which it already has taken in hand. Whether the Committee should be asked to carry its enquiries still further at the present moment is equally a matter for the Assembly. The Committee observes that it is natural for it to desire to wait and see what action is taken on its first proposals, and

also that the available resources will be fully occupied for some time in carrying out the work which it already has in view. It might, in fact, be desirable for the Council and Assembly to take no immediate decision as to the continuance of action under the Assembly's resolution of 1924, but to await the results of the first work of the Committee.

In the present report I have endeavoured, as briefly as possible, to set out the questions which the Council has to consider in dealing with the documents presented by the Committee of Experts, and have put forward various suggestions as to their solution which are, of course, intended as a basis for discussion. I shall be glad if my colleagues will express their views on the various points. The most convenient course would be, I think, for my report to be amended as far as may be necessary to make it express the general sense of the Council and for it to be transmitted to the Assembly as a basis for discussion there. With this object, I venture to propose the following draft resolution:

Resolution

“The Council of the League of Nations,

“Having considered the reports drawn up for submission to the Council by the Committee of Experts for the Progressive Codification of International Law at its third session, held from March 22nd to April 2nd, 1927, and the letter from the Chairman of the Committee to the Secretary-General dated April 2nd, 1927:

“Decides to transmit the above-mentioned documents and the report thereon of the Polish representative, as adopted by the Council at its meeting on June 13th, together with the Minutes of that meeting,¹ to the Assembly and to place the consideration of these documents and report upon the agenda of the Assembly.”

EXTRACT FROM THE MINUTES OF THE 45TH SESSION OF THE COUNCIL, FIRST MEETING, HELD ON JUNE 13TH, 1927

M. ZALESKI submitted to the Council the following report:

(See text printed above pp. 216-228.)

Jonkheer BEELAERTS VAN BLOKLAND said that he had read with the very greatest interest M. Zaleski's remarkable report concerning the reports submitted by the Committee of Experts for the Progressive Codification of International Law.

M. Zaleski had recalled the circumstances in which the Assembly adopted its resolution of September 22nd, 1924, a resolution which explicitly recognised the importance of the initiative taken by those Governments that were traditionally interested in a particular field of international law. In this connection, M. Zaleski had been good enough to mention, *inter alia*,

¹ The words “together with the Minutes of that meeting” were added by the Council.

the action taken by the Netherlands Government with reference not only to the convening of the two Peace Conferences held in 1899 and 1907, but also to the questions of private international law which had resulted in the well-known Conferences held at The Hague. He desired to thank M. Zaleski for the sympathetic terms in which he had referred to the initiative taken by the Netherlands Government.

He warmly associated himself with the expression of thanks in the report to the Committee of Experts, which had shown the greatest competence in carrying out its work, and he desired to support M. Zaleski's proposal for the printing of the Minutes of the present year's session. From the Minutes of the previous sessions the Members of the Council had been able to appreciate the great value of the Committee's discussions.

The work of the Committee as outlined by the Assembly was restricted to questions of international law regarding which no initiative had so far been taken in other quarters. In its recommendation, the Committee stated that there were seven subjects which, in certain aspects at any rate, were sufficiently ripe for regulation by way of international agreement. The Committee had further informed the Council that there were two subjects which it had placed on the list of questions deserving examination and regarding which questionnaires would have been sent to the Governments but for the fact that the Netherlands Government had placed them on the agenda of the forthcoming Hague Conference on Private International Law. These two questions were: the Nationality of Commercial Corporations and the Recognition of the Legal Personality of Foreign Commercial Corporations. It might be enquired whether the same procedure should not have been adopted in regard to the question of Nationality, which had also been placed on the agenda of the Conference on Private International Law, following on a recommendation made by the 1925 Conference. This was one of the questions which might perhaps be investigated subsequently when the Assembly came to take a decision on the recommendations submitted to it.

As to the question whether one or more conferences should be contemplated, Jonkheer Beelaerts van Blokland thought this of perhaps less importance than that of the method of convening.

M. Zaleski had suggested that it might be possible for the conference to be convened by a Government. If, for instance, any particular Government which was traditionally interested in the development of international law, and which had the special experience required for this purpose, were prepared to give its assistance, the Rapporteur had stated that he did not see any reason why the Assembly should not request such a Government to convene the conference with the full support of the League. The Netherlands Government thought that the convening of a conference by a particular Government might have certain advantages—among others, with regard to the co-operation of States which were not Members of the League.

If the Assembly shared this view, the Government of the Netherlands, which was anxious to be as helpful as possible in giving effect to the Assembly's desires, would have very great pleasure in carrying out to the best of its ability any such request, if made to it, and would not fail fully to take into account the extremely important work done by the Committee of Experts as well as the views of the Members of the League.

M. SCIALOJA said that, if the proposal to convene a conference in the name of the League of Nations were to be adopted, he would have to make certain reservations on some of the points raised by the Committee of Experts. He had, however, nothing to say against accepting the proposal of the representative of the Netherlands. It seemed to him that the Governments might be more ready to accept a proposal to hold a conference which came, not from the Council of the League, but from the Netherlands Government. Further, the work of such a conference would include the preparatory study which the problems submitted by the Committee of Experts appeared to him still to need. Before the League could itself take the initiative, it must be very nearly sure that such a conference would result, at any rate to a certain degree, in concrete proposals which could be accepted by the Governments. International law was developing very rapidly, but he did not think that the end was within reach. Progress must be made in that direction, however, and a Conference convened by the Government of the Netherlands would no doubt be a very important step in the right direction.

He would therefore support the proposal of the Netherlands representative, for he was convinced that it was the best which could be made.

Jonkheer BEELAERTS VAN BLOKLAND proposed to amend the third paragraph of the draft resolution proposed by M. Zaleski by adding after the words "adopted by the Council on . . ." the words "together with the Minutes of that meeting."

M. ZALESKI accepted this amendment.

The resolution was adopted as follows:

"The Council of the League of Nations,

"Having considered the reports drawn up for submission to the Council by the Committee of Experts for the Progressive Codification of International Law at its third session, held from March 22nd to April 2nd, 1927 and the letter from the Chairman of the Committee to the Secretary-General dated April 2nd, 1927:

"Decides to transmit the above-mentioned documents and the report thereon of the Polish representative, as adopted by the Council at its meeting on June 13th, together with the Minutes of that meeting, to the Assembly and to place the consideration of these documents and report upon the agenda of the Assembly."

LEAGUE OF NATIONS

Resolutions and Recommendation Adopted by the Assembly*

September 27, 1927

1. CODIFICATION OF INTERNATIONAL LAW

The Assembly,

Having considered the documents transmitted to it by the Council in conformity with its resolution of June 13th, 1927, and the report of the First Committee¹ (documents A. 18. 1927. V. and A. 105. 1927. V.) on the measures to be taken as a result of the work of the Committee of Experts for the Progressive Codification of International Law;

Considering that it is material for the progress of justice and the maintenance of peace to define, improve and develop international law;

Convinced that it is therefore the duty of the League to make every effort to contribute to the progressive codification of international law;

Observing that, on the basis of the work of the Committee of Experts, to which it pays a sincere tribute, systematic preparations can be made for a first Codification Conference, the holding of which in 1929 can already be contemplated;

Decides:

(1) To submit the following questions for examination by a first Conference:

- (a) Nationality;
- (b) Territorial Waters; and
- (c) Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners;

(2) To request the Council to instruct the Secretariat to cause its services to study, on the lines indicated in the First Committee's report, the question of the Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties;

(3) To instruct the Economic Committee of the League to study, in collaboration with the Permanent International Council for the Exploration of the Sea at Copenhagen and any other organisation specially interested in this matter, the question whether and in what terms, for what species and in what areas, international protection of marine fauna could be established. The Committee will report to the Council the results of its enquiry indicating whether a Conference of Experts should be convened for such purpose at an early date;

(4) To ask the Council to make arrangements with the Netherlands Gov-

* League of Nation's Official Journal, Special Supplement No. 53, Oct. 1927, pp. 9-10.

¹ Printed in the addendum hereto, p. 345.

ernment with a view to choosing The Hague as the meeting-place of the first Codification Conference, and to summon the Conference as soon as the preparations for it are sufficiently advanced;

(5) To entrust the Council with the task of appointing, at the earliest possible date, a Preparatory Committee, composed of five persons possessing a wide knowledge of international practice, legal precedents, and scientific data relating to the questions coming within the scope of the first Codification Conference, this Committee being instructed to prepare a report comprising sufficiently detailed bases of discussion on each question, in accordance with the indications contained in the report of the First Committee;¹

(6) To recommend the Council to attach to the invitations draft regulations for the Conference, indicating a number of general rules which should govern the discussions, more particularly as regards:

(a) The possibility, if occasion should arise, of the States represented at the Conference adopting amongst themselves rules accepted by a majority vote;

(b) The possibility of drawing up, in respect of such subjects as may lend themselves thereto, a comprehensive convention and, within the framework of that convention, other more restricted conventions;

(c) The organization of a system for the subsequent revision of the agreements entered into; and

(d) The spirit of the codification, which should not confine itself to the mere registration of the existing rules, but should aim at adapting them as far as possible to contemporary conditions of international life;

(7) To ask the Committee of Experts at its next session to complete the work it has already begun.

2. PROPOSAL BY THE DELEGATION OF PARAGUAY FOR THE PREPARATION OF A GENERAL AND COMPREHENSIVE PLAN OF CODIFICATION OF INTERNATIONAL LAW

The Assembly,

Having taken note of the First Committee's report¹ (document A. III. 1927. V.) on the proposal of the delegation of Paraguay for the preparation of a general and comprehensive plan of codification of international law;

Desires to place on record the importance which it attaches to the spirit underlying the proposal of the delegation of Paraguay;

Requests the Council to invite the Committee of Experts to consider at its next session under what conditions the work referred to in the said proposal could be undertaken;

And will decide later upon the course to be adopted after taking note of the suggestions of the Committee of Experts and the opinion of the Council in regard thereto.

¹ Printed in the addendum hereto, p. 345.

Appointment of the Preparatory Committee for the Codification Conference

NOTE BY THE SECRETARY-GENERAL

On September 28, 1927, M. Sokal, the representative of Poland, submitted a report to the Council on the action to be taken on the following resolution, which was adopted by the Assembly on September 27, 1927:

"The Assembly decides:

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"5. To entrust the Council with the task of appointing at the earliest possible date a Preparatory Committee composed of five persons possessing a wide knowledge of international practice, legal precedents and scientific data relating to the questions coming within the scope of the first Codification Conference, this Committee being instructed to prepare the report, comprising sufficiently detailed bases of discussion on each question, in accordance with the indications contained in the report of the First Committee."

The Council, on the proposal of the Rapporteur, decided to authorize its Acting President, in consultation with the Secretary-General, to appoint the members of the Committee in the interval between the forty-seventh and forty-eighth sessions of the Council.

As a result of this decision, the Acting President, after submitting a list of the proposed nominations to his colleagues on the Council, has appointed the following persons to serve on this Committee:

Professor Basdevant [France].

Counsellor Carlos Castro Ruiz [Chile].

Professor François [Netherlands].

Sir Cecil Hurst [Great Britain].

M. Massimo Pilotti [Italy].

INTERNATIONAL COMMISSION OF JURISTS

(Sessions held at Rio de Janeiro, Brazil, April 18th to May 20th, 1927)

PUBLIC INTERNATIONAL LAW

PROJECTS TO BE SUBMITTED FOR THE CONSIDERATION OF THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES *

Historical Exposition

The International Commission of American Jurists convened for the second time in the city of Rio de Janeiro to realize an aspiration which for many years the States of the New World have manifested, "The codification of public and private international law as a means of consolidating and developing the good relations which should exist between them."

The first meeting of the commission was held in this same city in 1912, in conformity with a resolution adopted in the premises by the Third Pan American Conference in 1906. The commission was then divided into six subcommissions, which until 1914, the date fixed for the second meeting, were to prepare drafts of the codification of laws.

Because of the Great War it has only now been possible to hold this second meeting.

As a contribution toward the great work of codification, scientific and practical works have been published in America.

The first works envisage a reconstitution of international law—that is, to submit to a rigorous scrutiny the bases and rules of this law in order that they may be brought into harmony with the new conditions of life in the States and adapted, in following, to the interests, necessities, sentiments, and aspirations of our continent.

Among these studies we must mention those presented to the American Institute of International Law by its president and secretary general and by Señor Alejandro Alvarez to the Commission of Jurists, not only in the first but in the second reunion as well.

The labors of a practical character, destined to serve the Commission of Jurists, were these:

The project of a code of international public law written by Señor Epitacio Pessoa, submitted by Brazil to the commission in 1912;

The projects which Señor Alejandro Alvarez, in his capacity as Chilean delegate, brought before the fifth conference at Santiago in 1923;

The projects elaborated by the American Institute of International Law upon the request of the Pan American Union; and finally

The projects which, with regard to certain determined subjects, various delegations had offered to the same institute in the recent session held in Montevideo.

*Published by the Pan American Union, Washington, D. C.

With these contributions the Commission of Jurists elaborated 12 projects of international public law, which deal with the following subjects:

The fundamental bases of international law;
States, their existence, equality, and recognition;
Status of aliens;
Treaties;
Exchange of publications;
Interchange of professors and students;
Diplomatic agents;
Consuls;
Maritime neutrality;
Asylum;
Duties of States in case of civil war;
Pacific solution of international conflicts.

With regard to international private law, the commission prepared a draft of a general convention based on the following labors:

Conventions signed in Montevideo in 1889;

Project of an international private code of Señor Lafayette Pereira, presented to the commission at its meeting in 1912 by the Brazilian delegation;

Projects organized by the fifth and sixth subcommittees of the first commission, which met in Montevideo and in Lima, respectively;

Project of a private international law code prepared at the request of the Pan American Union by the American Institute of International Law, and which is the work of Dr. Antonio de Bustamante.

Finally the commission approved still another project tending to give permanence to the work of codification, and still another with regard to the creation of a committee charged with the study of civil legislation in the various American States and the elaboration of a project of unification which will be submitted to the consideration of the governments.

The work of the codification of international public and private law having been carried out in the manner set forth, and to that point to which it was possible to do so, the permanent apparatus of codification being organized, and the States being disposed toward unification of civil legislation in the American States, the Commission of Jurists decided to send these works to the Sixth Pan American Conference that they may be given such consideration as the Conference may deem advisable.

The following propositions were presented by the delegates to the commission during the course of its labors:

From Haiti:

Any action carried out by a State, whether by means of diplomatic pressure or by armed force, in order to force its will upon that of the other State, constitutes intervention.

From the Argentine Republic:

First. A State may not intervene in the internal affairs nor in the external affairs of another State.

Second. That the Pan American Conference to meet at Habana shall be requested to adopt for the American States the Conventions of Brussels relative to the unification of maritime law in order that there may be uniformity throughout the world in this matter.

From the Dominican Republic and from Mexico:

No State may in the future directly or indirectly, nor by reason of any motive, occupy even temporarily any portion of the territory of another State. The consent given to the occupying State by the State occupied will not legitimize the occupation and the occupant will be responsible for all occurrences resulting from the occupation not only with respect to the State occupied but to third parties as well.

From Paraguay:

Intervention or any act of a State within the territory of another State without a previous declaration of war, with the intent to decide by force, material pressure, or moral coercion, internal or external questions of the other State, will be considered as a violation of international law.

From Mexico:

That there be recommended to the Governments of the American States the election of judges from the American Continent to compose the special tribunals of arbitration constituted or to be constituted for the solution of present or future conflicts.

From Colombia:

To recommend most earnestly to all of the American Governments that there be developed and stimulated by whatever means the Governments may have within their power, the formation of national societies of international law within the respective countries, that these may collaborate with the American Institute of International Law in the great work of spiritual approximation between all of the nations of the New World, and that they may cooperate in this way in the creation of a continental juridical conscience.

From Peru:

First. That the States declare what each understands by personal law in the applications of national law and the law of domicile, following the domestic laws of the States.

Second. That the States which observe the system of granting ex-

tradition in conformity with a list of crimes previously established shall make known opportunely the list of crimes. Wherein these States are concerned, an anteproject of extradition will be understood as being restricted to the offenses enumerated; regarding the others, the anteproject will obligate all in its generality.

Finally, from Ecuador:

That there shall be proposed the convenience of the unification of university studies and the interchange of professional titles in the great domain which is the American Continent, as one of the best means of obtaining the spiritual unity of the New World.

The Commission of Jurists understood with regard to these propositions that some of them did not have that degree of maturity necessary for incorporation in the codification, and others, being drafted in the terms in which they were, might be considered as manifestations of a means of obtaining the commission's views regarding pending American political questions. For this reason the commission decided to transmit some of them for the consideration of the Sixth International Conference, to meet in 1928 in the city of Habana.

INTERNATIONAL COMMISSION OF JURISTS

Project No. I

FUNDAMENTAL BASES OF INTERNATIONAL LAW

ARTICLE 1

International law includes the rules, customs, practices, and principles recognized by States as applicable in their relations.

ARTICLE 2

Positive international law forms part of the law of every State, and as such, shall be applied in cases appertaining thereto by the national authorities in accordance with the prescriptions of the respective political constitutions.

ARTICLE 3

National laws shall not contain dispositions contrary to international conventional law.

ARTICLE 4

International rules are derived from the formal consent of States, manifested by public treaties and other international acts, duly ratified and intended to establish an obligatory rule of conduct.

ARTICLE 5

Conventional rules bind only States which have ratified or adhered to them. But if they have a fundamental character and have been accepted by the great majority of States, one of them may request the good offices of the Pan American Union in order that they may, if possible, be accepted by all.

ARTICLE 6

The rules established by convention can be abrogated only by an express declaration of the States or by the adoption likewise formal of a contrary rule in accordance with the provisions contained in the Convention on Treaties.

ARTICLE 7

In the absence of conventional rules recourse shall be had to the following as auxiliary elements:

- (1) Customary rules of conduct.
- (2) Rules established by conventions, signed in international conferences, which have not yet been ratified, but whose ratification is pending and concerning which no reservations have been made.
- (3) Practices or usages which are more or less general. Such practices or usages can only be invoked between States which observe them.
- (4) General principles of international law.
- (5) Precepts of international justice.

ARTICLE 8

The general principles of international law are those derived from the rules of that law in force especially when they have been recognized by diplomatic acts, by arbitral awards, or by international tribunals.

ARTICLE 9

The precepts of international justice are those which public opinion recognizes as governing the relations between States, as they have been expressed in acts such as: *Voeux* of international conferences, resolutions of scientific institutions of recognized standing, opinions of contemporary publicists of authority.

ARTICLE 10

The practices of courtesy usually followed may be invoked by any State, but the refusal to observe them can, in no case, be considered an unfriendly act.

ARTICLE 11

Diplomatic proceedings, arbitral awards or those of international tribunals, and the decisions of national tribunals concerning international matters, as well as the opinion of publicists of authority, are without value as a source of law or as an element of interpretation, except in so far as they throw light upon existing law or upon the other elements indicated above as being auxiliary to legal rules.

ARTICLE 12

International rules should always be developed and interpreted in a spirit of cooperative solidarity in order that justice and general good may be attained.

ARTICLE 13

States directly injured by violation of international law may address themselves to the Pan American Union in order that it may bring about an exchange of views on the matter.

They may likewise have recourse to moral sanctions, such as an appeal to public opinion, the publication of official correspondence, a request for arbitration, and the severance of diplomatic relations.

ARTICLE 14

States, even though not directly injured, have the right to protest against violations of international law.

INTERNATIONAL COMMISSION OF JURISTS

Project No. II

STATES

EXISTENCE—EQUALITY—RECOGNITION

ARTICLE 1

The State, as a person of international law, must fulfil the following requirements:

- (1) Permanent population.
- (2) Definitely determined territory.
- (3) Constituted government.
- (4) Capacity to enter into relations with other States.
- (5) Degree of civilization such as enables it to observe the principles of international law.

ARTICLE 2

States are equal before the law, enjoy equal rights, and have equal capacity to exercise them. The rights of each are dependent not upon the power which it possesses to insure the exercise of them but solely upon the fact of their existence as a person of international law.

ARTICLE 3

No State may intervene in the internal affairs of another.

ARTICLE 4

A Federal State constitutes a single international person.

ARTICLE 5

The political existence of the State is independent of its recognition by other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to adopt whatever organization it considers proper, to legislate concerning its own interests, to administer its own services, and to determine the jurisdiction and competency of its tribunals. The exercise of these rights is limited only by the exercise of the rights of other States, by treaties, and by the principles of international law.

ARTICLE 6

The recognition of a State signifies that the State recognized accepts the personality of the other State, with all the rights and obligations established by international law.

Recognition is unconditional and irrevocable.

The recognition of a Government has for its object the commencement of diplomatic relations with such Government, or the normal continuation of relations previously existing.

ARTICLE 7

The recognition of a State or Government may be express or tacit. Tacit recognition results from any act implying an intention to recognize the new State or Government.

ARTICLE 8

A Government is to be recognized whenever it fulfills the following conditions:

- (1) Effective authority with a probability of stability and consolidation, the orders of which, particularly as regard taxes and military service, are accepted by the inhabitants.
- (2) Capacity to discharge preexisting international obligations, to contract others, and to respect the principles established by international law.

ARTICLE 9

A State loses its international personality only when it separates into two or more States, when it voluntarily incorporates itself with another State, or when it unites with another to form a single State.

INTERNATIONAL COMMISSION OF JURISTS

Project No. III

STATUS OF ALIENS

ARTICLE 1

States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.

ARTICLE 2

The nationals of one State who may be found in the territory of other States shall enjoy therein all the individual guaranties and all the civil rights which States grant to their own nationals, with due regard to the prescriptions of their political constitutions and to the laws of the State.

ARTICLE 3

Notwithstanding the dispositions of the preceding articles, States for reasons of public order or safety are permitted to expel foreigners domiciled, resident, or merely in transit through their territory.

States shall publish the general rules which they intend to follow in exercising this right.

The notice of expulsion will be communicated as soon as possible to the State of which the individual is a national.

States are required to receive their nationals expelled from foreign soil who seek to enter their territory.

ARTICLE 4

Foreigners as well as nationals are subject to the jurisdiction of the local laws, due consideration being given to the limitations expressed in conventions and treaties.

ARTICLE 5

Foreigners can not be obliged to perform military service, but those foreigners who are domiciled, unless they prefer to leave the country, may be compelled, under the same conditions as nationals, to perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war.

ARTICLE 6

Foreigners are liable for ordinary or extraordinary taxes, as well as for forced loans, always provided that such measures apply to the population generally, and that they are not destined to support acts against their country.

ARTICLE 7

Foreigners must not meddle in political activities which are the province of citizen of the country in which they happen to be. In cases of interference in political affairs by foreigners, the State to which they belong will not extend its protection to its nationals, who will, moreover, be subject to the penalties established by local law.

INTERNATIONAL COMMISSION OF JURISTS

Project No. IV

TREATIES

ARTICLE 1

Treaties will be concluded by the competent authorities of the contracting States according to their internal law, or by their duly authorized representatives.

ARTICLE 2

Treaties must be in writing. The confirmation, prorogation, renewal, re-establishment, or continuance must observe the same form, unless other stipulations have been made.

ARTICLE 3

The interpretation of treaties, when the contracting parties consider it necessary, must likewise be in writing.

ARTICLE 4

Treaties shall be published immediately after the exchange of ratifications.

ARTICLE 5

Treaties are obligatory—and in force only after ratification by the contracting States, even though this condition be not stipulated in the full powers of the negotiators nor appear in the treaty itself.

ARTICLE 6

Ratification must be unconditional and must embrace the entire treaty. It must be dispatched in writing in conformity with the constitution of the State.

In case the ratifying State makes reservations in the treaty, it shall become effective when the other contracting party, informed of the reservations, expressly accepts them.

In international conventions celebrated between different States, a reservation made by one of them in the act of ratification affects only the clause in question and the State to which it refers.

ARTICLE 7

A refusal to ratify is a right of States and can not be considered an unfriendly act. The refusal shall be communicated to the other contracting parties.

ARTICLE 8

The terms of a treaty are in effect from the date of exchange of ratifications, unless some other date has been agreed upon. Even in the latter event private rights remain safeguarded.

ARTICLE 9

Terms stipulated in a treaty for the benefit of a third State depend for their effect upon the express acceptance by the third State.

ARTICLE 10

No State can relieve itself of the obligations of a treaty nor modify its stipulations except by the agreement, secured by peaceful means, of the other contracting parties.

ARTICLE 11

A treaty continues in effect even though the constitution of the contracting States has been modified, unless its terms are entirely incompatible with the new condition of affairs resulting from this change.

ARTICLE 12

Whenever a treaty becomes impossible of execution through the fault of the party entering into the obligation or through circumstances which at the times of celebration it knew or could have foreseen, which circumstances were unknown to the other party, the former shall be responsible for damages resulting from the nonexecution.

ARTICLE 13

The execution of a treaty may, by express stipulation or by virtue of a special treaty, be placed wholly or partly under the guaranty of one or more States.

The guaranteeing State can intervene in the execution of the treaty only by virtue of a request by one of the interested parties, and then only under conditions expressly stipulated for intervention. When intervention takes place only such measures may be employed as are sanctioned by international law, and no more comprehensive or different demands than those made can be exacted by the State which has been guaranteed.

ARTICLE 14

A treaty ceases to be effective:

- (a) When the stipulated obligation has been fulfilled.
- (b) When the length of time for which it was made has expired.
- (c) When a condition rendering it void has happened.
- (d) By agreement between the parties.

- (e) By denunciation of the party entitled to a benefit thereunder.
- (f) By renunciation, if agreed upon.
- (g) When it becomes incapable of execution.

ARTICLE 15

Obligations contracted by treaty shall be sanctioned in cases of noncompliance as when diplomatic negotiations have failed, by decision of an international court of justice or by an arbitral tribunal.

ARTICLE 16

Treaties, especially those establishing principles of international law, can be denounced only in the same way in which they were established.

In default of any stipulation, a treaty may be denounced by any contracting State which will notify the others of this decision.

In this event the treaty will remain ineffective, as far as the denouncing State is concerned, for one year after the last notification, and will continue in effect for the other signatory States.

ARTICLE 17

Two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States.

INTERNATIONAL COMMISSION OF JURISTS

Project No. V

EXCHANGE OF PUBLICATIONS

ARTICLE 1

The States shall exchange among themselves official parliamentary, judicial, administrative, and statistical documents which may be published; also the works, geographical maps, either general or special, topographical plans, and all work of this kind published within their territory or whose publication they may subsidize.

This obligation shall remain in effect with respect to subsidized publications, although they may have been printed beyond the territory of the State which grants the subvention.

ARTICLE 2

Each Government will make as complete a collection as possible of the works referred to in the preceding article, especially those relating to the legislation, history, statistics, and geography of the country, and will send the collection to the other Governments and the Pan American Union.

ARTICLE 3

As these publications are received the Governments shall announce the fact in order that they may be consulted in the designated office or library.

ARTICLE 4

The exchange of publications, as well as the correspondence relative thereto, shall, in accordance with existing conventions, enjoy the privilege of the postal frank.

INTERNATIONAL COMMISSION OF JURISTS

Project No. VI

INTERCHANGE OF PROFESSORS AND STUDENTS

ARTICLE 1

The universities, preparatory schools, and colleges existing in the different American States, whether of an official character or due to private initiative, may establish between them interchanges of professors and students on the following bases:

(a) The institutions mentioned shall grant all necessary facilities in order that the professors whom they receive from one another may hold classes or lectures;

(b) These classes or lectures shall treat principally of scientific matters which are of interest to America, or which relate to special conditions of one or several countries of America, particularly that to which the professor belongs;

(c) Every year the institutions mentioned shall communicate to those with whom they desire to make an exchange of professors, the subjects to be treated of in their classes for foreign professors;

(d) The remuneration of the professors shall be paid by the institution which has appointed him, unless his services shall have been expressly requested, in which case his remuneration shall be borne by the institution which invited him;

(e) The institutions shall determine annually the amount intended to cover the expenses of the interchange of professors, either from their own budget or by special aid obtained from the Government of their country.

ARTICLE 2

The universities, preparatory schools, or colleges, both official and unofficial, shall create scholarships for the students of other countries, with or without reciprocity, adopting directly or through their Governments the necessary measures for the distribution of these scholarships.

Each institution shall appoint a commission charged with supervising the students holding scholarships, to direct them in their studies and in the performance of their obligations.

ARTICLE 3

The universities, both official and private, shall endeavor to meet periodically in congresses in order to establish better means of intellectual cooperation.

INTERNATIONAL COMMISSION OF JURISTS

Project No. VII

DIPLOMATIC AGENTS

ARTICLE 1

States have the right of being represented, one before the other, through diplomatic agents.

SECTION 1—CHIEFS OF MISSIONS

ARTICLE 2

Diplomatic agents are classed as ordinary and extraordinary.

Those who permanently represent the Government of one State before that of another are ordinary.

Those intrusted with a special mission or those who are accredited to represent the Government in international conferences or congresses are extraordinary.

ARTICLE 3

Diplomatic agents do not in any case represent the person of the chief of State, but only their Government, and they must be accredited to a recognized Government. In federal States the central Government only can appoint and receive diplomatic agents.

ARTICLE 4

Except as concerns precedents and etiquette, diplomatic agents, whatever their rank, have the same rights, prerogatives, and immunities. Rank is conferred by the Government which the agent represents, in agreement with the Government to which he is accredited.

Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the agent is accredited.

ARTICLE 5

In addition to the functions indicated in their credentials ordinary agents possess the authority which the laws and decrees of the respective countries confer upon them. They shall exercise their authority without coming into conflict with the laws of the country to which they are accredited.

ARTICLE 6

Governments can not accredit more than one ordinary representative to each of the other governments, but they may appoint various extraordinary agents.

ARTICLE 7

It is legitimate for each State to be represented by a single representative to more than one Government.

Different States may be represented before another by a single diplomatic agent.

ARTICLE 8

A diplomatic agent, duly authorized by his Government, may, with the consent of the local government, and upon the request of a State not represented by an ordinary agent before the latter Government undertake the temporary or incidental protection of the interests of the said State.

ARTICLE 9

States are free in the selection of their diplomatic agents; but they shall not invest with such functions the nationals of a State in which the mission must function.

ARTICLE 10

No State may accredit its agents to other States without previous request and approval.

A State may decline to receive an agent from another or, having accepted him, may request his recall. In such cases the State is not obliged to state the reasons for its decision, unless the recall of an agent intrusted exclusively with a temporary mission is involved or unless the State to which the agent belongs has the right to complain when it assumes a systematic and hostile character.

ARTICLE 11

Extraordinary diplomatic agents are accredited in the same manner as ordinary ones and enjoy the same prerogatives and immunities.

SECTION II—PERSONNEL OF LEGATIONS

ARTICLE 12

Each legation shall have the personnel determined by its Government.

ARTICLE 13

When the diplomatic agent is absent from the place where he exercises his functions or finds it impossible to discharge them, the person designated for that purpose by his Government will substitute for him, as *chargé d'affaires ad interim*.

SECTION III—SPECIAL AGENTS

ARTICLE 14

Agents appointed, alone or with others, for a special mission in the interior or outside of the country, as, for example, the defense of the country before

an arbiter, the delimitation of boundaries, investigations, mixed commissions, and claims commissions, and also as arbiters appointed to settle a controversy, shall enjoy, in the country where their functions are exercised and throughout their duration the same diplomatic immunities and prerogatives as ordinary agents.

ARTICLE 15

The members of organizations considered as persons in international law, those of permanent tribunals of international justice or of arbitration, also those of commissions of investigation created by international agreement, shall enjoy the immunities and prerogatives enjoyed by diplomatic agents. International officials shall enjoy the same privilege, even when exercising their functions in their own country; that is to say, those appointed by the Pan American Union or by other associations of States.

SECTION IV—DUTIES OF DIPLOMATIC AGENTS

ARTICLE 16

Foreign diplomatic officials may not interfere in the domestic or foreign political life of the State in which they exercise their functions.

ARTICLE 17

Diplomatic agents shall, in their official communications, address themselves to the minister of foreign relations of the country to which they are credited. Communications to the remaining authorities shall be made through the said minister.

ARTICLE 18

Neither the foreign diplomatic agent, nor the minister of foreign relations of the Government to which he is accredited may publish, without reciprocal consent, the official correspondence exchanged between them as long as the question is pending.

Governments may, nevertheless, publish, when they consider it proper, the official correspondence with their own representatives.

SECTION V—IMMUNITIES AND PREROGATIVES OF DIPLOMATIC AGENTS

ARTICLE 19

Diplomatic agents shall be inviolate as to their person, their residence, private or official, and their property. This inviolability covers:

- (a) All classes of diplomatic agents;
- (b) The entire official personnel of the diplomatic mission, excluding nationals of the country to which accredited;
- (c) The members of his own family living under the same roof;
- (d) The papers, archives, and correspondence of the mission.

ARTICLE 20

States must extend to the diplomatic agents accredited to them every facility for the exercise of their functions. They shall especially see to it that they are able to communicate freely with their Governments.

No judicial or administrative officer of the State to which the agent is accredited may enter the domicile of the latter, or of the legation, without the agent's consent.

ARTICLE 22

The diplomatic agent is obliged to deliver to the competent local authority, who requests it, any person accused or condemned for public crime who may have taken refuge in the legation.

ARTICLE 23

The private residence of the agent, as well as the seat of the legation, shall not enjoy the privilege of extraterritoriality.

ARTICLE 24

Diplomatic agents shall be exempt in the State to which they are accredited—

1. From all personal taxes, either national or local;
2. From all land taxes on the building of the legation, when it belongs to the respective Government;
3. From customs duties on articles destined for their personal use or for that of their family up to a sum fixed by the Government of the State to which they are accredited.

ARTICLE 25

Diplomatic agents shall be exempt from all jurisdiction, civil or criminal, of the State to which they are accredited; not being susceptible, except in the cases mentioned in article 27, of prosecution except in the courts of their own country.

The case may be tried before the competent court in the capital of the State which the agent represents, saving to him the right to prove that his domicile is elsewhere.

ARTICLE 26

The immunity from jurisdiction with respect to diplomatic functions survives these functions; in respect to others, however, it may not be invoked except during his functions.

ARTICLE 27

Immunity from jurisdiction shall not be admitted—

- (a) In actions originating from obligations contracted by the agent in the practice of a profession engaged in by him in the State, concurrent with dip-

lomatic functions, or referring to any industrial or commercial activity which is being carried on, or has been carried on in the territory of the State;

(b) In real actions, including possessory actions, relative to property, real or movable, situated in the territory, not relating to the resident of the agent, or of the legation, or dependent or accessory thereto;

(c) When the agent, duly authorized by his Government, waives his immunity;

(d) In actions resulting from his character as an heir or legatee of a national, or in an estate settled in the territory;

(e) In actions resulting from contracts entered into by him in the foreign State and not referring to the building and furnishings of the legation if, by express provisions or by the nature of the action, its execution may be demanded there;

(f) In actions for indemnity resulting from an offense or a quasi offense which he may have committed in the State.

ARTICLE 28

Persons who enjoy immunity from jurisdiction may refuse to appear as witnesses before the territorial courts. Nevertheless, if the statement should be requested through diplomatic channels he shall, in accordance with local legislation, give it in the building of the legation or send it in writing to the authority designated for this purpose.

ARTICLE 29

The diplomatic agent enters upon the enjoyment of his immunity from the moment that he passes the frontier of the State where he is going to serve and makes known his position.

The immunities shall continue during the period that the mission may be suspended, and, even after it shall be terminated, for the time necessary for the agent to be able to withdraw with the legation.

ARTICLE 30

The members of the mission shall be inviolate, also in the States which they cross to arrive at their post or to return to their own country, or in a State where they may casually be during the exercise of their functions and to whose Government they have made known their position.

ARTICLE 31

In case of the death of the diplomatic agent, his family shall continue to enjoy the immunities for a reasonable term until it may leave the State.

SECTION VI—TERMINATION OF THE DIPLOMATIC MISSION

ARTICLE 32

The mission of the diplomatic agent ends—

1. By the official notification of the Government of the agent to the other Government that they have terminated their functions;
2. By the expiration of the period fixed for the completion of the mission;
3. By the solution of the matter if the mission may have been created for a particular question;
4. By the delivery of passports to the agent by the Government to which he had been accredited;
5. By the request for passports addressed to the Government of the agent.

In the cases above mentioned a reasonable period shall be given the agent, the official personnel of the legation, and their respective families to quit the territory of the State. It shall, moreover, be the duty of the Government to which the agent was accredited to see that during this time none of them is molested or prejudiced in his person or his property.

The death or resignation of the head of the State, also the change of government or political régime of either of the two countries shall not terminate the mission of the diplomatic agent.

INTERNATIONAL COMMISSION OF JURISTS

Project No. VIII

CONSULS

SECTION I—APPOINTMENT AND FUNCTIONS

ARTICLE 1

States may appoint in the territory of others, with the express or tacit consent of the latter, consuls who shall there represent and defend their commercial and industrial interests and lend to their nationals such assistance and protection as they may need.

ARTICLE 2

The form and requirements for appointment, the kinds and rank of consuls, shall be regulated by the domestic laws of the respective State. The ceremonial shall be that of the country of residence.

ARTICLE 3

Unless consented to by the State where he is to serve one of its nationals may not act as consul. The granting of an exequatur gives authority to act.

ARTICLE 4

The consul having been appointed, the State shall forward through diplomatic channels to the other the respective commission which shall contain the name, rank, and authority of the appointee.

As to a vice consul or commercial agent appointed by the respective consul, where there is authorization by law, the commission shall be issued and communicated by the latter.

ARTICLE 5

States may reject consuls appointed in their territory or reduce the exercise of consular functions to certain special duties.

ARTICLE 6

The consul can be recognized as such only after having presented his commission or obtained the exequatur of the State in whose territory he is going to serve. Provisional recognition can be granted upon the request of the legation of the consul pending the delivery in due form of the exequatur.

Officials appointed under the terms of article 4 are likewise subject to this formality and in such case it rests with the respective consul to request the exequatur.

ARTICLE 7

The exequatur having been obtained, it shall be presented to the authorities of the consular district who shall protect the consul in the exercise of his functions and grant to him the immunities to which he is entitled.

ARTICLE 8

The territorial government may, for serious cause, withdraw the consul's exequatur, but, except in urgent cases, it shall not have recourse to this measure without previously attempting to obtain from the consul's government his recall.

ARTICLE 9

In case of the consul's death, absence, or unexpected disability the consular employee next in rank shall, with full right, be admitted to conduct the consulate; he must, nevertheless, communicate as early as convenient to the local authority the official action which confirms him in the conduct thereof. The consul upon entering upon his functions shall present to the local authority the employee, who, in the contingency indicated, is to substitute for him.

ARTICLE 10

Consuls shall exercise the functions that the law of their State confers upon them, without prejudice to the legislation of the country in whose jurisdiction they are serving.

ARTICLE 11

In judicial affairs in which his compatriots are involved consuls shall have the right of interference except as expressly provided for by local legislation.

ARTICLE 12

The consul can not compel his compatriots by force to comply with his orders or decisions, but, in cases where this is necessary, he shall have recourse to the competent local authorities.

ARTICLE 13

In the exercise of his functions, the consul shall cooperate officially with the authorities of his district. If his complaints are not taken care of he shall then bring them to the attention of the government of the State through the intermediary of his diplomatic representative it not being lawful in any case to communicate directly with the government except in the absence or nonexistence of a diplomatic representative.

ARTICLE 14

In case of nonexistence of a diplomatic representative of the consul's State the consul may undertake such diplomatic actions as the government of the State in which he functions permits in such cases.

ARTICLE 15

One person duly accredited for the purpose can combine diplomatic representation and the consular function.

SECTION II—RIGHTS OF CONSULS

ARTICLE 16

Consuls shall be subject to imprisonment or arrest for serious crime.

ARTICLE 17

Consuls are not obliged to appear as witnesses before the courts of the State where they exercise functions; they shall, in conformity with local legislation, give their testimony in the building of the consulate or send it in writing to the authority designated for that purpose. They shall nevertheless give it personally in a trial in criminal prosecutions when the accused are entitled to present them as witnesses for the defense.

If the personal appearance of the consul should be indispensable the territorial government, in case of refusal, can have recourse to diplomatic measures.

ARTICLE 18

For acts done in their official character and within the limits of their authority consuls shall not be subject to the local courts. In such instances the individual considering himself injured shall address his complaint to the territorial government which, if it considers the complaint to be in accordance with law, will urge it through diplomatic channels.

ARTICLE 19

With respect to nonofficial acts, consuls shall be subject, in civil as well as in criminal matters, to the courts of the State in which they exercise their functions.

ARTICLE 20

The provision in article 21 of the convention relative to diplomatic officials applies to the official residence of consuls and to the places used for the chancellery and archives.

ARTICLE 21

Consuls must keep the official archives separate from the private archives.

Consuls can not keep in the official archives or in the chancellery documents and articles foreign to their functions. These articles and documents are subject, just as those of any other foreigner, to the action of local authority, and the government of the State shall have recourse to diplomatic intervention to cause the consul to deliver them, if the latter resists compliance with the authority which legally demands them.

ARTICLE 22

The consul is obliged to deliver upon the simple request of the local authority persons accused or condemned for crime who may have taken refuge in the consulate.

ARTICLE 23

Consuls are exempt from the payment of direct taxes which fall on articles of official use.

Consuls of career shall likewise not pay war contributions.

ARTICLE 24

The employee who substitutes for the consul in his absence or inability (article 9) shall enjoy during his period in charge the same immunities and privileges.

ARTICLE 25

Consuls exercising another function or profession, or those who are not nationals of the State they represent, are subject to the personal services to which they were subject before appointment.

SECTION III—SUSPENSION AND TERMINATION OF CONSULAR FUNCTIONS

Consular functions are suspended by the consul's illness or leave of absence:

- (a) By his death;
- (b) By his retirement, removal, resignation, or recall;
- (c) By the cancellation of the exequatur.

INTERNATIONAL COMMISSION OF JURISTS

Project No. IX

MARITIME NEUTRALITY

SECTION I—GENERAL DECLARATION

ARTICLE 1

In case of war between two or more States the other States shall consider it a duty to remain neutral and to contribute by the offer of their good offices and mediation to putting an end to the conflict.

The fulfillment of this duty shall not in any case be considered by the belligerents as an unfriendly act.

SECTION II—THE PAN AMERICAN UNION

ARTICLE 2

In order to insure respect for the rights of neutrals, and particularly the freedom of commerce and navigation, which exists in time of peace, the governing board of the Pan American Union immediately upon the declaration of war shall meet to ascertain the common interests of the States and to suggest to them fitting measures.

SECTION III—FREEDOM OF COMMERCE IN TIME OF WAR

ARTICLE 3

The following rules will be observed with reference to commerce in time of war:

1. Warships of the belligerents have the right to stop and visit on the high seas and in territorial waters that are not neutral any merchant ship with the object of ascertaining its character and nationality and of verifying the conveyance of prohibited cargo or the violation of blockade. If the merchant ship does not heed the signal to stop, it may be pursued by the warship and stopped by force, but in such case the ship can not be attacked unless, after being stopped, it fails to observe the instructions which have been given it.

The ship shall not be rendered incapable of navigation before the crew and passengers have been placed in safety.

2. Belligerent submarines are subject to the foregoing rules. If the submarine can not capture the ship while observing these rules, it shall not have the right to attack or to destroy the ship.

ARTICLE 4

A ship detained for violation of neutrality, and its crew, shall be kept in the place and under the regulations which best suit the capturing State and

at the cost of the offending vessel. The capturing ship, except in the case of grave fault on its part, is not responsible for the damage which the ship may suffer.

ARTICLE 5

When the ship detained is transporting merchandise the merchandise destined to a neutral State shall be unloaded and that destined for other ports shall be transshipped.

ARTICLE 6

If the merchant ship which has been supplied with coal or other provisions in a neutral State gives all or part of its supplies to a belligerent ship, it shall not be permitted again to receive supplies or fuel in the same State.

ARTICLE 7

If it shall be suspected that a merchant ship, by its preparation or other circumstances, can supply to warships of its State the provisions which they may need, the neutral local authorities may, depending upon the case, consider it as an auxiliary ship and either refuse it all or any supplies, or it may demand of the agent of the company the guaranty that the ship in question will not act as an auxiliary or assist any belligerent ship.

As soon as the ship becomes suspect, the fact shall be communicated to the Pan American Union in order that it may consider the action that should be taken. This rule will be observed especially when the ship may have secretly left a neutral port.

SECTION IV—RIGHTS AND DUTIES OF BELLIGERENTS

ARTICLE 8

Belligerent States must refrain from any act of war in neutral waters or from any other act which may constitute on the part of the State that tolerates it a violation of neutrality.

ARTICLE 9

Under the terms of the preceding article there are forbidden to a belligerent State:

(a) To make use of neutral waters as a base of naval operations against the enemy or to renew or augment military supplies and the armament of its ships or to complete recruiting through the latter;

(b) To install in neutral waters radiotelegraph stations or any other apparatus which may serve as a means of communication with the land or sea forces or to make use of installations of this kind which may have been established before the war for exclusively military purposes and which have not been opened to the public.

ARTICLE 10

A belligerent warship is forbidden to remain in the ports or waters of a neutral State more than twenty-four hours. This prohibition will be communicated to the ship as soon as it arrives in port or in the territorial waters, and if, upon the declaration of war, already there, as soon as the neutral State becomes cognizant of this declaration.

1. Ships of war used exclusively for scientific, religious, or philanthropic purposes are not affected by this article.

2. A ship may extend its stay in port more than twenty-four hours in case of damage or bad conditions at sea, but must depart as soon as the cause of the delay ceases.

3. When, by the domestic law of the neutral State, the ship may not receive coal except within twenty-four hours of its arrival in port, the time of its stay may be extended an equal length of time.

ARTICLE 11

A ship which does not conform to the foregoing rules shall be interned by order of the Government. A ship shall be considered as interned from the moment that it receives notice to that effect from the local authorities, even though it has solicited a reconsideration of the order.

ARTICLE 12

The maximum number of ships of war of a belligerent which may be in a neutral port at the same time shall be three.

ARTICLE 13

A ship of war may not weigh anchor in a neutral port within less than twenty-four hours after that of an enemy warship. The one entering first shall depart first unless it is in such condition as to necessitate extending its stay. In every case the ship which arrived later has the right to notify the other through the competent local authority that within twenty-four hours it will leave the port, the one first entering, however, having the right to depart within that time. If it weighs anchor, the ship must observe the interval which is above provided for.

ARTICLE 14

Damaged belligerent ships shall not be permitted to make repairs in neutral ports beyond those that are essential to the continuance of the voyage and which in no degree signify an increase in its military strength.

1. The neutral State shall ascertain the nature of the repairs to be made and will see that they are made as rapidly as possible.

2. Damages which are found to have been produced by the enemy are not included in this condition but only the results of storm or accident.

ARTICLE 15

Belligerent ships may not take on supplies in neutral ports other than those normally needed in times of peace, nor may it take on more fuel than is essential to reach the port nearest its own State or to complete the filling of its bunkers if this is the method of determining its needs recognized by the neutral State.

ARTICLE 16

Belligerent ships which obtain fuel in a neutral port can not renew their supply in the same State within a period of three months thereafter.

ARTICLE 17

Where the sojourn, revictualment, and provisioning of belligerent ships in the ports, roadsteads, or territorial waters of neutrals are concerned, the provisions relative to ships of war shall apply equally:

1. To ordinary auxiliary ships;
2. To merchant ships transformed into warships, in accordance with the 1907 Hague Convention 7;
3. To belligerent merchant ships which lend regular or occasional assistance to ships of war of their country without having been converted into auxiliary ships conformably to the said convention;
4. To neutral ships which lend regular or occasional assistance to belligerent ships.

ARTICLE 18

Auxiliary ships of belligerents reconverted into merchant ships shall be admitted as such in neutral ports on condition:

1. Of not having violated the neutrality of the State where they arrive;
2. That the conversion has been made in the ports or territorial waters of the country to which the ship belongs or in the ports or waters of its allies;
3. That the conversion is genuine—that is, that the ship may not reveal by its crew or equipment that it can render its country's war fleet the services of an auxiliary, which it previously rendered;
4. That the government of the country to which the ships belong communicate to the remaining States the names of the ships which have lost this character to resume that of merchant ships;
5. That the government in question engages that the said ship will not in the future be used as an auxiliary to the war fleet.

ARTICLE 19

The airships of belligerent countries shall not fly above the territory or the territorial waters of neutrals if this is not in conformity with the regulations of the latter.

SECTION V—RIGHTS AND DUTIES OF NEUTRALS

ARTICLE 20

Of the acts of assistance on the part of a neutral State and commercial acts on the part of individuals, only the first are contrary to neutrality.

ARTICLE 21

A neutral State is forbidden—

(a) To deliver to a belligerent, directly or indirectly, or for whatever reason, ships of war, munitions, or any other war materials.

(b) To grant it loans or to open credits for it during the duration of war.

Credits that a neutral State may give to facilitate the sale or exportation of its food products and raw materials are not included in this prohibition.

ARTICLE 22

A prize can not be taken to a neutral port except in cases of unseaworthiness, stress of weather, or want of fuel or provisions. When the cause has disappeared the prize must leave immediately; if it fails to do so, or if none of the indicated conditions exist, the State shall suggest to it that it depart, and if not obeyed shall have recourse to the means at its disposal to disarm it, with its officers and crew, and to intern the prize crew placed upon it by the captor.

ARTICLE 23

A neutral State must likewise release the prize which may have been brought into one of its ports under conditions other than those indicated in article 22.

ARTICLE 24

A neutral State is not bound on behalf of either belligerent to prevent in its ports or waters the export or the transit of arms, munitions, and in general of anything which can serve an army or a fleet.

ARTICLE 25

A neutral State is not bound to oppose the voluntary departure of the nationals of belligerent States even though they leave simultaneously in great numbers; but it may oppose the voluntary departure of its own nationals desiring to enlist in the army of one of the belligerents.

ARTICLE 26

The use in time of war of the telegraph and cables of neutral States by belligerent countries shall be subject to the measures decreed by the local authority.

ARTICLE 27

If, in consequence of naval operations beyond the jurisdictional waters of the neutral State there should be dead or wounded on board belligerent vessels, temporary hospital ships can be sent to the scene of the disaster with the authorization of the belligerents taking part in the action, under the control and supervision of the neutral government. These vessels shall enjoy complete inviolability during their mission.

ARTICLE 28

A neutral State is bound to exercise all possible vigilance to prevent any violation of the foregoing conditions in its ports and waters. The mere fact of the commission of a hostile act in its jurisdiction is not sufficient to indicate responsibility; it is essential to show guilty intent and manifest negligence on its part.

SECTION VI—FULFILLMENT AND SANCTION OF LAWS OF NEUTRALS AND BELLIGERENTS

ARTICLE 29

A belligerent shall make good the damage caused by its violation of the foregoing dispositions. It shall likewise be responsible for the acts of persons forming part of its armed forces.

ARTICLE 30

The Pan American Union may, in agreement with the governments interested, appoint commissions to observe how the belligerents conform to the laws and usages of war.

The reports of these commissions will make it possible to ascertain whether or not there have been violations of the laws and practices of war. If so, the Pan American Union, should it deem it advisable, may protest in the name of the States against the violation which has been committed.

INTERNATIONAL COMMISSION OF JURISTS

Project No. X

ASYLUM

ARTICLE 1

States are forbidden to grant asylum in any part of their jurisdiction to persons suspected of crime or condemned for common crime, or to deserters from the army or navy.

ARTICLE 2

Asylum granted to persons accused of political crimes, in national territory, in legations, on war vessels, or in military camps or aircraft, must be respected.

ARTICLE 3

Any person guilty of common crimes who seeks asylum in a legation, war vessel or military aircraft, must be surrendered whenever the local government demands it. If asylum was granted in the national territory, surrender can be brought about only through extradition in accordance with the stipulations in the Convention of Private International Law.

ARTICLE 4

Asylum will not be permitted when it would obviously benefit one opposing side more than the other.

ARTICLE 5

Asylum can be granted only in urgent cases, and only for a space of time absolutely necessary for the person who has sought asylum to ensure in some other way his safety, by means of an agreement between the representatives of the two States.

ARTICLE 6

As soon as he has granted asylum, the chief of mission, commander of a vessel, camp, or military aircraft must communicate the fact to the minister of foreign affairs of the State of the person who has secured asylum, or to the administrative or military authority of the place, if the case occurred outside the capital.

ARTICLE 7

Persons enjoying asylum can not be disembarked at any point of the national territory nor in any place near thereto.

ARTICLE 8

Persons enjoying asylum will be prevented from committing in the places where they have found refuge acts which might jeopardize the public peace of the State against which the crime was committed.

ARTICLE 9

States are under no obligation to defray expenses incurred by those who grant asylum.

INTERNATIONAL COMMISSION OF JURISTS

Project No. XI

OBLIGATIONS OF STATES IN EVENT OF CIVIL WAR

ARTICLE 1

In the event of insurrection or civil war in a State, the government of the several neighboring States obligate themselves to observe the following rules:

(1) Not to permit the inhabitants, whether nationals or foreigners, of their territory to take part in warlike preparations, recruit men or cross the frontier for the purpose of starting or fomenting insurrection or civil war.

(2) To intern and disarm any rebel force crossing the frontier, or any crew of an armed vessel in the service of the rebels which may be found in their jurisdiction, all expenses of internment being for the account of the State where the uprising occurred.

(3) To prohibit the traffic in arms and munitions of war, in transport material, and in material to be used in terrestrial, aerial, maritime, or fluvial communication, except when they belong to the government.

(4) To prevent their telegraphic or telephonic, radiotelegraphic or radiotelephonic stations from being used for the purpose of subversive action.

(5) To prevent any vessel in their jurisdiction, intended for use in the interest of the uprising, from being manned, armed, or adapted for warlike purpose.

INTERNATIONAL COMMISSION OF JURISTS

Project No. XII

PACIFIC SETTLEMENT OF INTERNATIONAL CONFLICTS

PART I—GOOD OFFICES AND MEDIATION

ARTICLE 1

In case of serious disagreement or conflict which it has not been possible to settle by direct diplomatic negotiations the States shall, before entering upon any other procedure and providing that circumstances permit, request the good offices or the mediation of one or more friendly States.

ARTICLE 2

The other States, independently of the appeal of the States in conflict, can spontaneously offer their good offices or their mediation.

This offer can be made even during the course of hostilities and shall in no case be considered by the contending States as an unfriendly act.

ARTICLE 3

The mission of the State offering its good offices or offering to act as mediator shall be limited to reconciling the opposing claims and composing the resentments which may have arisen between the two States in conflict and shall cease from the moment that it is ascertained either *ipso facto* or by statement of one of the parties, that the methods of conciliation proposed are not accepted.

ARTICLE 4

Good offices and mediation partake exclusively of the character of advice without any obligatory force. The State offering them is, for this reason, not responsible for the agreements entered into.

PART II—COMMISSION OF INVESTIGATION

ARTICLE 5

Every controversy of fact, which for whatever cause, arises between two or more States and which it has not been possible to adjust through diplomatic channels, or to submit to arbitration in conformity with existing treaties, shall be subjected to investigation and to the opinion of a commission constituted in agreement with the terms of article 8. None of the parties shall start mobilization or concentration of troops on the frontier of the other nor undertake any hostile act or preparations for hostilities from the moment that preparations for the meeting of the commission are begun until the latter has given its opinion or until the expiration of the term indicated in article 16.

ARTICLE 6

Any one of the Governments directly interested in the investigation of the facts can request the convening of the commission, and to this end it will suffice for it to communicate officially its resolution to the other party or to one of the permanent commissions provided for in article 7.

ARTICLE 7

There shall be two permanent commissions with headquarters in Buenos Aires and in Bogotá. They shall be composed of the three American diplomatic representatives who have been accredited to the said capitals for the longest time. These shall, upon the call of the minister of foreign relations of the respective States, meet and elect their presidents. Their functions shall be limited to receiving from the interested parties the request for convening the commission of investigation and of the immediate notification of the other party. The government which requests the meeting shall at the same time appoint the persons who are to represent it on the commission of investigation, and the other party, as soon as it receives notification, shall likewise designate its delegates.

As soon as the request for meeting has been received and the respective notifications for the permanent commission made the question of controversy existing between the two parties shall, *ipso facto*, be suspended.

ARTICLE 8

The commission of investigation shall be composed of five members, all Americans, appointed in the following manner: Each government shall designate two at the time of the summons to the meeting, of which one only shall be chosen from its own nationals. The fifth shall be elected by common agreement by those already appointed and shall discharge the duties of president; there may nevertheless not be elected a citizen of a State already represented on the commission. Any one of the governments may reject the member elected, even without expressing its reasons, and the successor shall be appointed with the consent of the parties within 30 days following the notification of rejection. In case of disagreement the appointment shall be made by the chief of one of the States not interested in the controversy, and shall be chosen by lot, by the members already appointed, from a list of six chiefs of State, which will be formed as follows: Each party, individually or collectively, shall designate three chiefs of State who maintain equally friendly relations with the other party.

If more than two governments are directly interested in the controversy and the interest of two or more of them is identical, the government or governments of each side shall have the right to increase the number of their representatives in so far as may be necessary, in order that both parties shall have equal representation on the commission.

When organized the commission shall notify the respective governments of the date of its installation and shall determine the place or places where it will function, bearing in mind the best facilities for the investigation. The place having been designated, it shall not be changed without the consent of the parties.

The commission of investigation shall establish for itself its rules of procedure.

Its decisions and final opinion shall be adopted by majority vote.

Each party shall bear its own expenses and a proportional part of the expenses of the commission.

ARTICLE 9

The commissions shall have authority to summon witnesses, administer oaths, and receive evidence and statements.

ARTICLE 10

During investigation the parties shall be heard and can be represented by one or more lawyers and experts.

ARTICLE 11

The members of the commission shall bind themselves before the highest judicial authority of the place where they meet, faithfully and strictly to discharge their duties.

ARTICLE 12

The commission shall notify each party of the statements of the other and shall fix the period for the taking of evidence.

As soon as the parties are notified, the commission shall proceed to the investigation, even though the parties fail to appear.

ARTICLE 13

As soon as the commission of investigation is organized, upon the request of any one of the parties, the status in which they are to remain until the commission presents its report shall be fixed.

ARTICLE 14

The parties shall furnish the antecedents and the data necessary to the investigation. The commission shall render its report within one year, dating from the time of its inauguration. If it is not possible to terminate the investigation or to draft the report within that period, it shall be extended for six months, if the parties agree thereto.

ARTICLE 15

The conclusions of the commission shall be considered as a report on the controversy and not as a judicial sentence or an arbitral award.

ARTICLE 16

The opinion having been delivered to the parties and the Pan American Union, the former shall have a period of six months to renew negotiations and to arrive at a solution of the difficulties, bearing in mind the conclusions of the said report; if during this new period they can not arrive at a friendly solution they will recover their complete liberty of action and proceed according to their interests.

PART III—CONCILIATION

ARTICLE 17

In the event of a serious question which endangers the peace of nations any one of the parties can have recourse to the governing board of the Pan American Union, which shall thereupon exercise the functions of a council of conciliation.

The request shall be addressed to the Director General of the Union, who shall without delay present it to the president of the governing board. The latter shall summon the board immediately. The interested States shall refrain from direct communication with one another during the governing board's determination of the nature and form of its recommendation.

PART IV—FRIENDLY COMPOSITION

ARTICLE 18

Any question which has not been resolved by any of the methods which have been mentioned shall upon request of the parties be submitted to the chief executive of any one of the American States or to any other person who has the confidence of the said parties. The chief executive or the person chosen shall assume the functions of "friendly compositor" and shall render his award.

A special agreement of the parties shall express the terms of the acceptance and the procedure to be followed by them and by the friendly compositor.

PART V—ARBITRATION

ARTICLE 19

Arbitration has as its object the legal solution of conflicts by means of judges chosen by the interested States.

ARTICLE 20

The convention of arbitration has as its object existing questions and those which may arise in the future, and includes any and every question or only those of certain classes.

ARTICLE 21

The convention of arbitration implies on the part of the States which subscribe to it the duty lawfully to submit to the award.

ARTICLE 22

The permanent tribunal of arbitration, organized in conformity with the provisions of the "Convention for Pacific Settlement" of The Hague of 1907, shall be competent for all cases of arbitration. If the conflict was submitted to the said tribunal, the constitution thereof and the procedure to be followed shall be those of the before-mentioned "convention."

ARTICLE 23

The questions which the parties desire to be decided by a court of justice can be submitted to the Permanent Court of International Justice of The Hague under the conditions provided for in the statute, or to any other court of justice which may be constituted for this purpose by the American States.

When the parties have recourse to the Permanent Court of International Justice of The Hague, the procedure to be followed shall be that of the statutes of the court in question.

INTERNATIONAL COMMISSION OF JURISTS

(Sessions held at Rio de Janeiro, Brazil, April 18-May 20, 1927)

PRIVATE INTERNATIONAL LAW

PROJECT TO BE SUBMITTED FOR THE CONSIDERATION OF THE SIXTH INTERNATIONAL CONFERENCE OF AMERICAN STATES *

PROJECT OF A GENERAL CONVENTION OF PRIVATE INTERNATIONAL LAW

TITLE I. GENERAL RULES

ARTICLE 1

Foreigners belonging to any of the contracting States enjoy, in the territory of the others, the same civil rights as are granted to nationals.

Each contracting State may, for reason of public order, refuse or limit to special conditions the exercise of certain civil rights by the nationals of the remaining States and any of those States may in similar cases refuse the same exercise to the nationals of the others.

ARTICLE 2

Foreigners belonging to any of the contracting States shall also enjoy in the territory of the others identical individual guarantees and political rights with those of nationals, except as limited in each of them by the Constitution.

Identical political rights do not include, unless especially provided in the domestic legislation, the exercise of public functions and the right of suffrage.

ARTICLE 3

For the exercise of civil rights and the enjoyment of identical individual guarantees, the laws and regulations in force in each contracting State are deemed to be divided into the three following classes:

1. Those applying to persons by reason of their domicile or their nationality and following them even when they go to another country, termed personal or of an internal public order.

2. Those binding alike upon the persons residing in the territory, whether or not they are nationals, termed territorial, local or of a public international nature.

3. Those applying only through the expression, interpretation or presumption of the will of the parties or of one of them, termed voluntary or of a private order.

*Published by the Pan American Union, Washington, D. C.

ARTICLE 4

Constitutional precepts are of an international public order.

ARTICLE 5

All rules of individual and collective protection, established by political and administrative law, are also of an international public order, except in case of express provisions therein enacted to the contrary.

ARTICLE 6

In all cases not provided for in this convention, each one of the contracting States shall apply its own definition to the juridical institutions or relationships corresponding to the groups of laws mentioned in article 3.

ARTICLE 7

Each contracting State shall apply as personal law that of the domicile or that of the nationality according to the system which its domestic legislation may have adopted or may hereafter adopt.

ARTICLE 8

The rights acquired under the rules of this convention shall have full extraterritorial force in the contracting States, except when any of their effects or consequences is in conflict with a rule of an international public order.

BOOK ONE—INTERNATIONAL CIVIL LAW

TITLE I. PERSONS

CHAPTER I. NATIONALITY AND NATURALIZATION

ARTICLE 9

Each contracting party shall apply its own law for the determination of the nationality of origin of any individual or juridical person and of its acquisition, loss or recovery thereafter, either within or without the territory, whenever one of the nationalities in controversy may be that of said State. In other cases the provisions established by the remaining articles of this chapter shall govern.

ARTICLE 10

In questions relating to the nationality of origin in which the State in which they are raised is not interested, the law of that one of the nationalities in issue in which the person concerned has his domicile shall be applied.

ARTICLE 11

In the absence of that domicile, the principles accepted by the law of the trial court shall be applied in the case mentioned in the preceding article.

ARTICLE 12

Questions concerning individual acquisition of a new nationality shall be determined in accordance with the law of the nationality which is supposed to be acquired.

ARTICLE 13

In collective naturalizations in case of independence of a State, the law of the new State shall apply if it has been recognized by the State judging the issue, and in the absence thereof that of the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference.

ARTICLE 14

In the case of loss of nationality, the law of the lost nationality should be applied.

ARTICLE 15

Resumption of nationality is controlled by the law of the nationality which is resumed.

ARTICLE 16

The nationality of origin of corporations and foundations shall be determined by the law of the State which authorizes or approves them.

ARTICLE 17

The nationality of origin of associations shall be the nationality of the country in which they are constituted, and in which they should be registered or recorded if such requisite is demanded by the local legislation.

ARTICLE 18

Civil, commercial, or industrial partnerships which are not incorporated shall have the nationality of the place where its principal management or governing body is habitually located.

ARTICLE 19

So far as corporations are concerned, nationality shall be determined by the law of the place where the general meeting of shareholders is normally held, and in the absence thereof, by the law of the place where its principal governing or administrative board or council is located.

ARTICLE 20

Change of nationality of corporations, foundations, associations and partnerships, except in cases of change of territorial sovereignty, shall be subject to the conditions required by their old law and by the new.

Where in the case of independence, territorial sovereignty is changed, the rule established in Article 13 for collective naturalizations shall apply.

ARTICLE 21

The provisions of Article 20 and of the four preceding Articles shall be applied in the contracting States which ascribe nationality to juridical persons.

CHAPTER II. DOMICILE

ARTICLE 22

The concept, acquisition, loss and recovery of domicile of natural or juridical persons shall be governed by the territorial law.

ARTICLE 23

The domicile of diplomatic officials and that of individuals temporarily residing abroad in the employment or commission of their Government or for scientific or artistic studies, shall be the last that they had in their own territory.

ARTICLE 24

The legal domicile of the head of the family extends to the wife and minor children, and the domicile of the guardian or administrator extends to the minors or incapables under his guardianship, unless otherwise provided by the personal legislation of those to whom the domicile of another is ascribed.

ARTICLE 25

Questions relating to change of domicile of natural or juridical persons shall be determined in accordance with the law of the court, if it is that of one of the interested States, otherwise they shall be determined by the law of the place in which it is alleged they have acquired their last domicile.

ARTICLE 26

For persons having no domicile the place of their residence or, where they may happen to be, shall be considered as such.

CHAPTER III. BIRTH, EXTINCTION AND CONSEQUENCES OF CIVIL PERSONALITY

Section 1—Individual Persons

ARTICLE 27

The capacity of individual persons is governed by personal law, except for the restrictions established for its exercise by this Convention or by local law.

ARTICLE 28

Personal law shall be applied for the purpose of deciding whether birth determines personality and whether the unborn child is to be deemed as

born for all purposes favorable to him, as well as for the purpose of viability and the effects of priority of birth in the case of double or multiple childbirth.

ARTICLE 29

The presumptions of survivorship or simultaneous death, in the absence of proof, are governed by the personal law of each of the deceased persons in so far as their respective estates are concerned.

ARTICLE 30

Each State shall apply its own legislation for the purpose of declaring that civil personality is extinguished by the natural death of individual persons and the disappearance or official dissolution of juristic persons, as well as for the purpose of deciding whether minority, insanity or imbecility, deaf-dumbness, prodigality, and civil interdiction are only restrictions upon the status of persons permitting the existence of rights and even certain obligations.

Section 2—Juridical Persons

ARTICLE 31

Each contracting State, as a juristic person, has full capacity to acquire and exercise civil rights and to assume obligations of the same character within the territory of the others, without restrictions other than those expressly established for by the local law.

ARTICLE 32

Excepting the restrictions established in the two preceding Articles, the civil capacity of corporations is governed by the law which has created or recognized them; that of foundations by the rules of their institution, approved by the proper authority if required by their national law, and that of associations by their constitution, under like conditions.

ARTICLE 33

The concept and recognition of juridical persons shall be governed by the territorial law.

ARTICLE 34

With the same restrictions, the civil status of civil, mercantile or industrial societies is governed by the provisions relative to the contract of partnership.

ARTICLE 35

The local law applies for the purpose of escheat in respect to the property of juristic persons which have ceased to exist, unless otherwise provided for in their by-laws, charters, or in the law in force for associations, to the region, province, municipality, or State which should receive the benefits thereof.

CHAPTER IV. MATRIMONY AND DIVORCE

Section 1—Legal Conditions Which Must Precede Their Celebration

ARTICLE 36

The parties thereto shall be subject to their personal law in so far as it relates to their capacity to celebrate marriage, the parents' consent or advice, impediments and their dispensation.

ARTICLE 37

Foreigners must show before marrying that they have complied with the conditions provided by their personal laws in respect of the provisions of the preceding article. They may do so by a certificate issued by their diplomatic or consular agents or by any other means deemed sufficient by the local authority, who shall have full liberty of appreciation in every case.

ARTICLE 38

Local legislation is applicable to foreigners in respect to the impediments which it establishes as indispensable, to the form of consent, to the binding or nonbinding force of the betrothal, to the opposition to the marriage, the obligation of notifying impediments and the civil consequences of a false notice, to the form of preliminary procedure, and to the authority who may be competent to perform the ceremony.

ARTICLE 39

The liability or nonliability for breach of promise of marriage or for the publication of bans in such case is governed by the common personal law of the parties and in the absence thereof by the local law.

ARTICLE 40

The contracting States are not obliged to recognize a marriage celebrated in any one of them, by their nationals or by foreigners, which is in conflict with their provisions relative to the necessity of dissolution of a former marriage, to the degree of consanguinity or affinity, in respect to which there exists absolute impediment, to the prohibition of marriage established in respect to those guilty of adultery by reason of which the marriage of one of them has been dissolved, and to the same prohibition in respect to the one guilty of an attempt on the life of one of the spouses for the purpose of marrying the survivor.

Section 2—Form of Marriage

ARTICLE 41

A marriage shall be held valid everywhere in respect to its form if it has been celebrated in the manner prescribed as valid by the laws of the country

where it has taken place. However, the States whose legislation prescribes a religious ceremony may refuse to recognize the validity of marriages entered into by their nationals abroad without the observance of that form.

ARTICLE 42

In the countries where the law admits thereof, marriages entered into by foreigners before the diplomatic or consular agents both contractants shall be subject to their personal law, without prejudice to the application thereto of the provisions of Article 40.

Section 3—Effect of Marriage in Respect to the Persons of the Spouses

ARTICLE 43

The personal law of the spouses shall be applied, and if different, that of the husband, in that which concerns the respective duties of protection and obedience, the obligation or the non-obligation of the wife to follow the husband when he changes his residence, the disposition and administration of the common property and of other special effects of marriage.

ARTICLE 44

The personal law of the wife shall govern the disposition and administration of her own property and her appearance in trial.

ARTICLE 45

The obligation of the spouses to live together and be faithful to and help each other is subject to the territorial law.

ARTICLE 46

A local law which deprives the marriage of a bigamist of civil effects is also imperatively applied.

Section 4—Nullity of Marriage and Its Effects

ARTICLE 47

The nullity of marriage should be governed by the law to which the intrinsic or extrinsic condition which gives rise to it is subject.

ARTICLE 48

Coercion, fear, and abduction as causes of nullity of marriage are governed by the law of the place of solemnization.

ARTICLE 49

The personal law of the spouses if it is the same, otherwise that of the spouse who acted in good faith, and in the absence of both that of the male,

shall apply in respect to the rules regarding the care of the children of void marriages in cases in which the parents can not or do not wish to stipulate anything on the subject.

ARTICLE 50

The same personal law shall be applied to all other civil effects of a void marriage, except those which it must produce in respect to the property of the spouses, which shall follow the law of the matrimonial economic régime.

ARTICLE 51

The rules fixing the judicial effects of the action of nullity are of an international public order.

Section 5—Separation and Divorce

ARTICLE 52

The right to separation and divorce is regulated by the law of the matrimonial domicile, but it can not be founded on causes prior to the acquisition of said domicile if they are not authorized with equal effect by the personal law of both spouses.

ARTICLE 53

Each contracting State has the right to permit or recognize, or not, the new marriage of persons divorced abroad, with effects or for causes which are not admitted by their personal law.

ARTICLE 54

The causes of divorce and separation shall be subject to the law of the place in which they are solicited, provided that the spouses are domiciled there.

ARTICLE 55

The law of the court before which the litigation is pending determines the judicial consequences of the action and of the terms of the judgment in respect to the spouses and the children.

ARTICLE 56

Separation and divorce, obtained in conformity with the preceding Articles produce civil effects in accordance with the legislation of the court which grants them, in the other contracting States, except for the provision in Article 53.

CHAPTER V. PATERNITY AND FILIATION

ARTICLE 57

Rules concerning the presumption of legitimacy and its conditions, those conferring the right to the name and those which determine the evidence of

filiation and regulate the inheritance of the child are rules of an internal public order, the personal law of the child if different from that of the father being applied.

ARTICLE 58

The rule granting rights of inheritance to legitimated children partake of the same character, but in this case the personal law of the father is applied.

ARTICLE 59

The rule which gives a child the right to maintenance is of an international public order.

ARTICLE 60

The capacity to legitimate is governed by the personal law of the father, and the capacity to be legitimated by the personal law of the child, legitimation requiring the concurrence of the conditions prescribed by both.

ARTICLE 61

A prohibition against legitimation of children not simply natural is of an international public order.

ARTICLE 62

The consequences of legitimation and the action to impugn it are subject to the personal law of the child.

ARTICLE 63

The investigation of paternity and maternity and its prohibition are regulated by territorial law.

ARTICLE 64

The rules prescribing the required conditions for acknowledgment, compelling it in certain cases, establishing the actions necessary for the purpose, granting or refusing the family name, and fixing the causes of nullity, are subject to the personal law of the child.

ARTICLE 65

The inheritance rights of illegitimate children are subject to the personal law of the father, and those of illegitimate parents are subject to the personal law of the child.

ARTICLE 66

The form and circumstances of acknowledging illegitimate children are subordinate to territorial law.

CHAPTER VI. MAINTENANCE AMONG RELATIVES

ARTICLE 67

The legal concept of maintenance, the order in which it is to be provided, the manner of furnishing it, and the extinction of that right shall be subject to the personal law of the one to be maintained.

ARTICLE 68

The provisions establishing the duty to provide maintenance, its quantity, reduction or increase, the time at which it is due, and the manner in which it is to be provided, as well as those forbidding the renunciation and the assignment of that right, are of an international public order.

CHAPTER VII. PATERNAL POWER

ARTICLE 69

The existence and general extent of paternal power in respect to person and property, as well as the cause of its extinction and recovery, and the limitation, by reason of a new marriage, of the right to punish, are subject to the personal law of the child.

ARTICLE 70

The existence or nonexistence of the right of usufruct and all other rules applicable to the different classes of his private property are also subject to the personal law of the child, whatever the nature of the property or the place where it is situated may be.

ARTICLE 71

The provisions of the preceding article are to be applied in foreign territory without prejudice to the rights of the third parties which may be granted by local law and the local provisions in respect to publicity and specialty of mortgage securities.

ARTICLE 72

The provisions governing the nature and restrictions of the right of the father to correct and punish and his recourse to the authorities, as well as of the provisions depriving him of the right by reason of incapacity, absence or by court rule are of a public international order.

CHAPTER VIII. ADOPTION

ARTICLE 73

The capacity to adopt and to be adopted and the conditions and limitations of adoption are subject to the personal law of each of the interested persons.

ARTICLE 74

The effects of adoption are regulated by the personal law of the adopting party in so far as his estate is concerned, and by that of the adopted one in respect to the name and the rights and duties which he retains regarding his natural family, as well as to his estate in regard to the adopting person.

ARTICLE 75

Either one of the interested persons may repudiate the adoption in accordance with the provisions of his personal law.

ARTICLE 76

Provisions regulating in this matter the right to maintenance, as well as provisions establishing solemn forms for the act of adoption, are of an international public order.

ARTICLE 77

The provisions of the four preceding articles do not apply in States whose legislation does not recognize adoption.

CHAPTER IX. ABSENCE

ARTICLE 78

Provisional measures in the case of absence are of an international public order.

ARTICLE 79

Notwithstanding the provisions of the preceding article, the representation of the person whose absence is presumed shall be designated in accordance with his personal law.

ARTICLE 80

The personal law of the absentee determines who is competent to institute an action requesting such declaration and establishes the order and conditions of the administrators.

ARTICLE 81

The local law should be applied for the purpose of deciding when the declaration of absence is made and takes effect and when and how the administration of the property of the absentee shall terminate as well as the obligation and manner of rendering accounts.

ARTICLE 82

Everything relating to the presumption of death of the absentee and his eventual rights is regulated by his personal law.

ARTICLE 83

A declaration of absence or of its presumption as well as its cessation and that of presumption of death of the absentee have extraterritorial force, including what has reference to the appointment and powers of the administrators.

CHAPTER X. GUARDIANSHIP

ARTICLE 84

The personal law of the minor or incapacitated shall be applied to what concerns the object of the guardianship or curatorship, its organization, and its different classes.

ARTICLE 85

The same law is to be observed in respect to the appointment of an ancillary guardian.

ARTICLE 86

To incapacities and excuses concerning guardianship, curatorship, and ancillary guardianship must be simultaneously applied the personal laws of the guardian, curator, or ancillary guardian of the minor or incapacitated person.

ARTICLE 87

The security to be furnished by the guardian or curator and the rules for the exercise of guardianship are subject to the personal law of the minor or incapacitated person. If the security is a mortgage or a pledge, it is to be furnished in the manner prescribed by the local law.

ARTICLE 88

Obligations relating to accountings, except responsibilities of a penal nature, which are territorial, are also governed by the personal law of the minor or incapacitated person.

ARTICLE 89

In respect to registration of guardianships, the local and the personal laws of the guardian or curator and of the minor or incapacitated person shall be simultaneously applied.

ARTICLE 90

The precepts which compel the public prosecutor or any other local functionary to request the declaration of incapacity of insane and deaf mutes and those fixing the procedure to be followed for that declaration are of an international public order.

ARTICLE 91

Rules establishing the consequences of interdiction are also of an international public order.

ARTICLE 92

The declaration of incapacity and interdiction have extraterritorial force.

ARTICLE 93

Local law shall be applied to the obligation of the guardian or curator to support the minor or incapacitated person and to the power to correct them to a moderate degree.

ARTICLE 94

The capacity to be a member of a family council is regulated by the personal law of the interested person.

ARTICLE 95

The special incapacities and the organization, functioning, rights and duties of the family council, are subject to the personal law of the ward.

ARTICLE 96

The proceedings and resolutions of the family council shall in all cases conform with the forms and solemnities prescribed by the law of the place in which it meets.

ARTICLE 97

The contracting States which consider personal law as that of the place of domicile may, when the law of incapacity of one country is changed for another, require that the guardians or administrators shall be again approved or appointed.

CHAPTER XI. PRODIGALITY

ARTICLE 98

A spendthrift decree and its effects are subject to the personal law of the spendthrift.

ARTICLE 99

Notwithstanding the provisions of the preceding article, the law of the domicile shall not be applied to a spendthrift decree respecting persons whose national law ignores this institution.

ARTICLE 100

A spendthrift decree made in one of the contracting States shall have extraterritorial force in respect to the others.

CHAPTER XII. EMANCIPATION AND MAJORITY

ARTICLE 101

The rules applicable to emancipation and majority are the ones established by the personal legislation of the interested person.

ARTICLE 102

However, the local legislation may be declared applicable to majority as a requisite for electing the nationality of said legislation.

CHAPTER XIII. CIVIL REGISTRY

ARTICLE 103

The provisions relating to the civil registry are territorial, except in respect to the registers kept by consular or diplomatic agents.

The provision in this Article does not affect the rights of another State in juridical relations submitted to the jurisdiction of international public law.

ARTICLE 104

A literal and formal certificate of each inscription relating to a national of any of the contracting States, made in the civil registry of another shall be sent gratuitously and through diplomatic channels to the country of the interested person.

TITLE II. PROPERTY

CHAPTER I. CLASSIFICATION OF PROPERTY

ARTICLE 105

All property of whatever description, is subject to the law of the situation.

ARTICLE 106

For the purposes of the preceding article, in respect to personal property of a corporal nature, and of all titles representative of debts of any kind, account shall be taken of the place of their ordinary or normal situation.

ARTICLE 107

The situation of debts is determined by the place in which they should be paid, and, if that is not fixed, by the domicile of the debtor.

ARTICLE 108

When the property belongs to a community, to an undivided inheritance, or to any other universal juristic entity, its situation shall coincide with the legal situation attributed to the owner or the person from whom he derives his title.

ARTICLE 109

Industrial property, copyrights, and all other similar rights of an economic nature which authorize the exercise of certain activities granted by law, are considered to be situated where they have been formally registered.

ARTICLE 110

In the absence of any other rule and also in cases not provided for in this Convention, it shall be understood that personal property of every kind is situated in the domicile of its owner, or in his absence, in that of the tenant.

ARTICLE 111

From the provision of the preceding article are excepted things given as pledge, which are considered as situated in the domicile of the person in whose possession they have been placed.

ARTICLE 112

The territorial law shall be always applied for the purpose of distinguishing between personal and real property, without prejudice to rights acquired by third parties.

ARTICLE 113

The other juridical classifications and qualifications of property are subject to the same territorial law.

CHAPTER II. PROPERTY

ARTICLE 114

Inalienable family property exempt from incumbrances and attachments is governed by the law of the place.

However, the nationals of a contracting State in which that kind of property is not admitted or regulated shall not be able to hold it or organize it in another, except in so far as it does not injure their necessary heirs.

ARTICLE 115

Copyrights and industrial property shall be governed by the provisions of the special international conventions at present in force or concluded in the future.

In the absence thereof, their acquisition, registration, and enjoyment of said property shall remain subject to the local law which grants them.

ARTICLE 116

Each contracting State has the power to subject to special rules, as respects foreigners, property in mines, in fishing and coasting vessels, in industries in territorial waters and in the maritime zone, and the acquisition and enjoyment of concessions and works of public utility and public service.

ARTICLE 117

The general rules relating to property and the manner of acquiring it or the transfer thereof *inter vivos*, including those applicable to treasure trove,

as well as those covering the waters of public and private domain and the use thereof, are of an international public order.

CHAPTER III. COMMUNITY PROPERTY

ARTICLE 118

Community property is governed in general by the agreement or will of the parties and in the absence thereof by the law of the place. The latter shall be the domicile of the community, in the absence of an agreement to the contrary.

ARTICLE 119

The local law shall be always applied, exclusively, to the right of requesting a division of the thing held in common and to the forms and conditions of its exercise.

ARTICLE 120

Provisions relative to surveying and marking and the right to enclose rural properties, as well as those relating to ruined buildings and trees threatening to fall, are of an international public order.

CHAPTER IV. POSSESSION

ARTICLE 121

Possession and its effects are governed by local law.

ARTICLE 122

The modes of acquiring possession are governed by the law applicable to each mode according to its nature.

ARTICLE 123

The means and procedure to be employed in order to maintain the possession of a holder, disquieted, disturbed, or dispossessed by judicial measures or resolutions or in consequence thereof are determined by the law of the court.

CHAPTER V. USUFRUCT, USE AND HABITATION

ARTICLE 124

When the usufruct is established by the mandate of the law of a State contracting, the said law shall govern it obligatorily.

ARTICLE 125

If it has been established by the will of private persons as manifested in acts *inter vivos* or *mortis causa*, the law of the act or that of the succession shall be respectively applied.

ARTICLE 126

If it springs from prescription, it shall be subject to the local law which establishes it.

ARTICLE 127

The precept which does or does not excuse the usufructuary father from furnishing security depends upon the personal law of the child.

ARTICLE 128

The requiring of security by the surviving spouse for the hereditary usufruct and the obligation of the usufructuary to pay certain legacies or hereditary debts are subordinated to the law of the succession.

ARTICLE 129

The rules defining the usufruct and the forms of its establishment, those fixing the legal causes which extinguish it, and that which limits it to a certain number of years for peoples, corporations, or partnerships are of an international public order.

ARTICLE 130

Use and habitation are governed by the will of the party or parties who establish them.

CHAPTER VI. SERVITUDES

ARTICLE 131

The local law shall be applied to the concept and classification of servitudes, to the noncontractual ways of acquiring them and extinguishing them, and to the rights and obligations in this case of the owners of the dominant and servient lands.

ARTICLE 132

The servitudes of a contractual or voluntary origin are subject to the law of the instrument or juridical relationship which creates them.

ARTICLE 133

From the provision of the preceding article are excepted community of pasturage on public lands and the redemption of the use of wood and all other products of the mountains of private ownership which are subject to the territorial law.

ARTICLE 134

The rules applicable to legal servitudes imposed in the interest or for the use of private persons are of a private order.

ARTICLE 135

Territorial law should be applied to the concept and enumeration of legal servitudes and to the nonconventional regulation of those relating to waters, passage, party walls, light and prospect, drainage of buildings, and distances and intermediate works for constructions and plantations.

CHAPTER VII. REGISTRIES OF PROPERTY

ARTICLE 136

Provisions establishing and regulating them and imposing them as necessary as regards third persons are of an international public order.

ARTICLE 137

There shall be recorded in the registries of property of each of the contracting States the recordable documents or titles executed in another which have validity in the former in accordance with this Convention, and executory judgments which, under this Convention, shall give effect in the State to which the registry belongs or which have in it the force of *res adjudicata*.

ARTICLE 138

Provisions relating to legal mortgages in favor of the State, provinces, or towns are of an international public order.

ARTICLE 139

The legal lien which some laws grant the benefit of to certain individual persons shall be enforceable only when the personal law agrees with the law of the place in which the property thereby affected is situated.

TITLE III. VARIOUS MODES OF ACQUISITION

CHAPTER I. GENERAL RULE

ARTICLE 140

With respect to those modes regarding which nothing to the contrary appears in the provision of this Convention the local law is applied to the modes of acquisition.

CHAPTER II. GIFTS

ARTICLE 141

When of a contractual origin gifts shall remain subject for their perfection and effects *inter vivos*, to the general rules of contracts.

ARTICLE 142

The capacity of both the donor and the donee shall be subject to the respective personal law of each of them.

ARTICLE 143

Gifts which are to take effect on the death of the donor shall partake of the nature of testamentary provisions and shall be governed by the international rules established in this convention for testamentary succession.

CHAPTER III. SUCCESSIONS IN GENERAL

ARTICLE 144

Successions, both intestate and testamentary, including the order of descent the quantity of the rights of descent and the intrinsic validity of the provisions, shall be governed, except as hereinafter provided, by the personal law of the person from whom the rights are derived.

ARTICLE 145

The precept by which the rights to the estate of a person are transmitted from the moment of his death is of an international public order.

CHAPTER IV. WILLS

ARTICLE 146

The capacity to devise by will is regulated by the personal law of the testator.

ARTICLE 147

The territorial law shall be applied to the rules established by each State for the purpose of showing that an insane testator acted in a lucid interval.

ARTICLE 148

Provisions forbidding a joint will or a holograph, and those which declare it to be a purely personal act are of an international public order.

ARTICLE 149

Rules concerning the form of private papers relating to wills and concerning the nullity of a will made under duress of violence, deceit, or fraud, are also of an international public order.

ARTICLE 150

The rules on the form of wills are of an international public order, except those concerning a will made in a foreign country, and military and maritime wills when made abroad.

ARTICLE 151

The procedure, conditions, and effects of the revocation of a will are subject to the personal law of the testator, but the presumption of revocation is determined by the local law.

CHAPTER V. INHERITANCE

ARTICLE 152

The capacity to inherit by will or without it is regulated by the personal law of the heir or legatee.

ARTICLE 153

Notwithstanding the provision of the preceding article, incapacities to inherit, which the contracting States consider as such, shall be of an international public order.

ARTICLE 154

The appointment of heirs and substitution shall be according to the personal law of the testator.

ARTICLE 155

The local law shall, nevertheless, be applied to the prohibition of fideicommissary substitutions beyond the second degree, or those made in favor of persons not living at the time of the death of the testator, and of those involving a perpetual prohibition against alienation.

ARTICLE 156

The appointment and powers of testamentary executor depend upon the personal law of the deceased and should be recognized in each one of the contracting States in accordance with that law.

ARTICLE 157

In case of intestate estates, in which the law designates the State as heir in the absence of others, the personal law of the person from which the right is derived shall be applied; but if it is designated as occupant of *res nullius*, the local law shall be applied.

ARTICLE 158

The precautions which are to be taken when the widow is pregnant shall be in accordance with the provisions of the legislation of the place where she happens to be.

ARTICLE 159

The formalities required in order to accept the inheritance with benefit of inventory or for the purpose of using the right of deliberating shall be subject to the law of the place where the succession is opened; and this is sufficient to produce their extraterritorial effects.

ARTICLE 160

The rule referring to the unlimited preservation of the inheritance or establishing provisional partition, is of international public order.

ARTICLE 161

The capacity to solicit and carry into effect a division is subject to the personal law of the heir.

ARTICLE 162

The appointment and the powers of the auditor or appraiser depend upon the personal law of the person from whom the title is derived.

ARTICLE 163

The payment of hereditary debts is subordinated to the same law. However, the creditors who have security of a real nature may realize on it in accordance with the law controlling said security.

TITLE IV. OBLIGATIONS AND CONTRACTS

CHAPTER I. OBLIGATIONS IN GENERAL

ARTICLE 164

The concept and classification of obligations are subject to the territorial law.

ARTICLE 165

Obligations arising from the operation of law are governed by the law which has created them.

ARTICLE 166

Obligations arising from contracts have the force of law among the contracting parties and must be fulfilled in accordance therewith, except for the limitations established in this Convention.

ARTICLE 167

Those arising from crimes or offenses are subject to the same law as the crime or offense from which they arise.

ARTICLE 168

Those arising from actions or omissions involving guilt or negligence not punishable by law shall be governed by the law of the place in which the negligence or guilt giving rise to them was incurred.

ARTICLE 169

The nature and effect of the various classes of obligations, as well as the extinction thereof, are governed by the law of the obligation in question.

ARTICLE 170

Notwithstanding the provision in the preceding Article local law regulates the conditions of payment and the money in which payment should be made.

ARTICLE 171

The law of the place also determines who is to cover the judicial costs for enforcing payment and regulates them.

ARTICLE 172

The evidence relative to obligations is subject, so far as its admission and value is concerned, to the law governing the obligation itself.

ARTICLE 173

Objection to the certainty of the place where a private instrument was executed, if having any bearing on its validity, may be made at any time by a third party prejudiced thereby, and the burden of proof shall be on him who makes it.

ARTICLE 174

The presumption of *res judicata* by a foreign judgment shall be admissible whenever the judgment unites the necessary requirements for its execution within the territory, in conformity with the present convention.

CHAPTER II. CONTRACTS IN GENERAL

ARTICLE 175

The rules which prevent the conclusion of contracts, clauses, and conditions in conflict with the law, morality, and public policy, and the one which forbids the taking of an oath and regards the latter as void, are of an international public order.

ARTICLE 176

The rules which determine the capacity or incapacity to give consent depend upon the personal law of each contracting party.

ARTICLE 177

The territorial law shall be applied to mistake, violence, intimidation, and fraud, in connection with consent.

ARTICLE 178

Every rule which prohibits as the subject matter of contracts, services contrary to law and good morals and things placed outside the field of trade, is also territorial.

ARTICLE 179

Provisions which refer to unlawful matters in contracts are of an international public order.

ARTICLE 180

The law of the place of the contract and that of its execution shall be applied simultaneously to the necessity of executing a public writing or document for the purpose of giving effect to certain agreements and to that of reducing them to writing.

ARTICLE 181

The rescission of contracts by reason of incapacity or absence is determined by the personal law of the absentee or incapacitated person.

ARTICLE 182

The other causes of rescission and the form and effects thereof are subordinated to the territorial law.

ARTICLE 183

Provisions relating to the nullity of contracts shall be subject to the law upon which the cause of nullity depends.

ARTICLE 184

The interpretation of contracts should be effected, as a general rule, in accordance with the law by which they are governed. However, when that law is in dispute and should appear from the applied law of the parties, the legislation provided for in that case in Articles 185 and 186 shall be presumptively applied, although it may result in applying to the contract a different law as a consequence of the interpretation of the law of the contract.

ARTICLE 185

Aside from the rules already established and those which may be hereafter laid down for special cases, in contracts of accession, the law of the one proposing or preparing them is presumed to be accepted, in the absence of an expressed or implied consent.

ARTICLE 186

In all other contracts and in the case provided for in the preceding article, the personal law common to the contracting parties shall be first applied, and in the absence of such law there shall be applied that of the place where the contract was concluded.

CHAPTER III. CONTRACTS CONCERNING PROPERTY IN RESPECT TO MARRIAGE

ARTICLE 187

This contract is governed by the personal law common to the parties, and in the absence thereof, by that of the first matrimonial domicile.

The same laws determine, in that order, the supplemental legal control in the absence of stipulation.

ARTICLE 188

The precept which forbids the making of marriage settlements during wedlock or of modifying them, or alteration in the control of property by changes of nationality or of domicile after marriage are of international public order.

ARTICLE 189

Those relating to the enforcement of laws and good morals, to the effects of marriage settlements affecting third parties, and to the solemn form thereof are of the same character.

ARTICLE 190

The will of the parties regulates the law applicable to gifts by reason of marriage, except in respect to their capacity, to the safeguard of lawful rights of subsistence and the nullity thereof during wedlock all of which is subordinated to the general law covering marriage, provided that the international public order does not affect it.

ARTICLE 191

The provisions concerning dowry and paraphernalia depend on the personal law of the wife.

ARTICLE 192

The law which repudiates the inalienability of dower is of international public order.

ARTICLE 193

Prohibition against renouncing to an institution of gain during marriage is of international public order.

CHAPTER IV. SALE, ASSIGNMENT AND EXCHANGE

ARTICLE 194

Provisions relating to compulsory alienation for purposes of public utility are of an international public order.

ARTICLE 195

It is the same with provisions fixing the effects of possession and registration among various acquirers and those referring to legal redemption.

CHAPTER V. LEASES

ARTICLE 196

In respect to leases of things, the territorial law should be applied to such measures as are intended to protect the interests of third parties and to that which fixes the rights and duties of the purchaser of leased real estate.

ARTICLE 197

In so far as the contract for services is concerned, the rule which prevents the making of such contract for life or for more than a certain time is of an international public order.

ARTICLE 198

Legislation relating to accidents of labor and social protection of the laborer is also territorial.

ARTICLE 199

Special local laws and regulations for transport by air, land or water are territorial.

CHAPTER VI. ANNUITIES

ARTICLE 200

The territorial law is applied to the determination of the concept and classes of annuities, the redeemable character and prescription thereof, and the real action arising therefrom.

ARTICLE 201

In respect to annuities emphyteutic, provisions fixing the conditions and formalities thereof, prescribing an acknowledgment every certain number of years, and forbidding subemphyteusis, are also territorial.

ARTICLE 202

In case of transferable annuities, the rule forbidding that payment in fruits may consist of an aliquot number of the products of the land subject to the annuity is of an international public order.

ARTICLE 203

The same is the character of the demand that the land subject to the annuity be appraised, in the case of reservative annuities.

CHAPTER VII. PARTNERSHIPS

ARTICLE 204

Laws requiring a lawful object, solemn forms, and an inventory when there is real estate, are territorial.

CHAPTER VIII. LOANS

ARTICLE 205

Local law is applied to the necessity of an express agreement for interest and the rate thereof.

CHAPTER IX. BAILMENT

ARTICLE 206

Provisions relating to necessary bailments and attachments are territorial.

CHAPTER X. ALEATORY CONTRACTS

ARTICLE 207

The effects of capacity in actions arising out of gaming are determined by the personal law of the interested party.

ARTICLE 208

The local law defines lottery contracts and determines the game of chance and the betting which is permitted or forbidden.

ARTICLE 209

A provision which declares null and void an annuity constituted on the life of a person deceased at the time of its creation, or at a time when he was suffering from an incurable disease, is territorial.

CHAPTER XI. COMPROMISES AND ARBITRATION

ARTICLE 210

Provisions forbidding compromise or arbitration of certain matters are territorial.

ARTICLE 211

The extent and effects of the arbitration and the authority of *res judicata* of the compromise also depends upon the territorial law.

CHAPTER XII. SECURITY

ARTICLE 212

A rule forbidding the surety to assume a greater liability than that of the principal debtor is of an international public order.

ARTICLE 213

To the same class belong the provisions relating to legal or judicial security.

CHAPTER XIII. PLEDGE, MORTGAGE AND ANTICHRESIS

ARTICLE 214

The provision forbidding the creditor to appropriate to himself the chattels received by him as pledge or mortgage is territorial.

ARTICLE 215

The precepts fixing the essential requirements of the pledge contract are also territorial, and they must be complied with, together with it, when the thing which is pledged is taken to a place where such requirements are different from those required when the contract was concluded.

ARTICLE 216

The provisions by virtue of which the pledge is to remain in the possession of the creditor or of a third party, the one which requires as against strangers that a certain date be expressed in a public instrument, and the one which fixes the procedure for the alienation of the pledge, are also territorial.

ARTICLE 217

Especial rules of pawnshops and analogous establishments are territorially binding in respect to all transactions made with them.

ARTICLE 218

The provisions fixing the objects, conditions, requisites, extent, and recording of the mortgage contract are territorial.

ARTICLE 219

A prohibition against the creditor acquiring the property of the real estate involved in the antichresis, for default in payment of the debt is also territorial.

CHAPTER XIV. QUASI-CONTRACTS

ARTICLE 220

The conduct of another's business is regulated by the law of the place in which it is effected.

ARTICLE 221

The collection of that which is not due is subject to the common personal law of the parties and, in the absence thereof, to that of the place in which the payment was made.

ARTICLE 222

The other quasi contracts are subject to the law which regulates the legal institution which gives rise to them.

CHAPTER XV. CONCURRENCE AND PREFERENCE OF DEBTS

ARTICLE 223

When concurrent obligations have no real character and are subject to one and the same law, the latter shall also regulate the preference of said obligations.

ARTICLE 224

In respect to those which are guaranteed by a real action, the law of the situation of the guaranty shall apply.

ARTICLE 225

Aside from the cases provided for in the preceding articles, the law of the trial court should be applied to the preference of debts.

ARTICLE 226

When the question is simultaneously presented in more than one court of different States, it shall be determined in accordance with the law of that one which actually has under its jurisdiction the property or money which is to render the preference effective.

CHAPTER XVI. PRESCRIPTION

ARTICLE 227

Acquisitive prescription of both real and personal property is governed by the law of the place where they are situated.

ARTICLE 228

If personal property should change situation during the period of prescription, the latter shall be governed by the law of the place where it is at the moment the period required is completed.

ARTICLE 229

Extinctive prescription of personal actions is governed by the law to which the obligation which is to be extinguished is subject.

ARTICLE 230

Extinctive prescription of real actions is governed by the law of the place where the object to which it refers is situated.

ARTICLE 231

If in the case provided for in the preceding article personal property has changed its location during the period of prescription, the law of the place where the property is found at the completion of the time there specified for prescription shall apply.

BOOK TWO—INTERNATIONAL MERCANTILE LAW

TITLE I. MERCHANTS AND COMMERCE IN GENERAL

CHAPTER I. MERCHANTS

ARTICLE 232

The capacity to engage in commerce and to become party to commercial acts and contracts, is regulated by the personal law of each interested person.

ARTICLE 233

To the same personal law are subordinated incapacities and their cessation.

ARTICLE 234

The law of the place where the business is carried on should be applied in the measures for publicity necessary that persons incapacitated therefor, may engage in it through their representatives, and married women by themselves.

ARTICLE 235

The local law should be applied to the incompatibility to engage in commerce of public servants and of commercial agents and brokers.

ARTICLE 236

Every incompatibility for commerce resulting from laws or special provisions in force in any territory shall be governed by the law of the same.

ARTICLE 237

The said incompatibility, in so far as diplomatic and consular agents are concerned, shall be measured by the law of the State appointing them. The country where they reside has also the right to forbid them to engage in commerce.

ARTICLE 238

The law of the contract is applied to the prohibition against collective or silent partners engaging in commercial transactions, or in certain classes of them, on their own account or on that of others.

CHAPTER II. THE QUALITY OF MERCHANTS AND ACTS OF COMMERCE

ARTICLE 239

For all purposes of a public character, the quality of merchant is governed by the law of the place where the act has taken place or where the trade in question has been carried on.

ARTICLE 240

The form of contracts and commercial acts is subject to the territorial law.

CHAPTER III. COMMERCIAL REGISTRY

ARTICLE 241

Provisions relating to the recording in the commercial registry of foreign merchants and partnerships are territorial.

ARTICLE 242

Rules fixing the effect of recording in said registry the credits or rights of third parties have the same character.

CHAPTER IV. PLACES AND HOUSES OF COMMERCIAL TRAFFIC AND OFFICIAL
QUOTATION OF PUBLIC SECURITIES AND COMMERCIAL PAPER PAYABLE TO
BEARER

ARTICLE 243

The provisions relative to the places and houses of commercial traffic and official quotation of public securities and commercial paper payable to bearer are of an international public order.

CHAPTER V. GENERAL PROVISIONS RELATING TO COMMERCIAL CONTRACTS

ARTICLE 244

The general rules provided for civil contracts in Chapter II, Title IV, Book I, of this convention shall be applied to commercial contracts.

ARTICLE 245

Contracts by correspondence shall be complete only when the conditions prescribed for the purpose by the legislation of all the contracting parties have been duly complied with.

ARTICLE 246

Provisions relating to unlawful contracts and terms of grace, courtesy, and others of a similar nature are of an international public order.

TITLE II. SPECIAL COMMERCIAL CONTRACTS

CHAPTER I. COMMERCIAL COMPANIES

ARTICLE 247

The commercial character of a collective or silent partnership is determined by the law to which the articles of partnership are subject, and in the absence thereof, by the law of the place where it has its commercial domicile.

If those laws do not distinguish between commercial and civil societies, the law of the country where the question is submitted to the courts shall be applied.

ARTICLE 248

The commercial character of a corporation depends upon the law of the place where the general meetings of shareholders thereof are held, and in the absence thereof, the law of the place where its board of directors is normally located.

If the said laws should not distinguish between commercial and civil societies, the said corporations shall have either character according to whether it is or not registered in the commercial registry of the country where the question is to be judicially determined. In the absence of a commercial registry the local law of the latter country shall be applied.

ARTICLE 249

Questions relative to the constitution and manner of operation of commercial societies and the liability of the members thereof are subject to the law of the articles of partnership.

ARTICLE 250

The issue of shares and obligations in one of the contracting States, the forms and guarantees of publicity and the liability of managers of agencies and branch offices in respect to third persons are subject to the territorial law.

ARTICLE 251

Laws subordinating the partnership to a special régime by reason of its transactions are also territorial.

ARTICLE 252

Mercantile partnerships duly constituted in a contracting State shall enjoy the same juridical personality in the other States except for the limitations of territorial law.

ARTICLE 253

Provisions referring to the creation, operation, and privilege of banks of issue and discount, general warehouse companies, and other similar companies are territorial.

CHAPTER II. COMMERCIAL COMMISSION

ARTICLE 254

Provisions relating to the form of an urgent sale by a commission merchant to save as far as possible the value of the articles of the commission are of an international public order.

ARTICLE 255

The obligations of the factor are subject to the law of the place where the mandate was conferred on him.

CHAPTER III. COMMERCIAL DEPOSITS AND LOANS

ARTICLE 256

The noncivil liabilities of a depositary are governed by the law of the place where the deposit is made.

ARTICLE 257

The rate of freedom of commercial interest is of an international public order.

ARTICLE 258

Provisions relating to loans upon collateral of quotable securities made in the exchange, through the intervention of a duly authorized broker or official functionary, are territorial.

CHAPTER IV. TERRESTRIAL TRANSPORTATION

ARTICLE 259

In cases of international transportation there is only one contract, governed by the proper law corresponding to it according to its nature.

ARTICLE 260

Time limits and formalities for the exercise of actions arising out of this contract but not provided for therein are governed by the law of the locality where the facts took place.

CHAPTER V. CONTRACTS OF INSURANCE

ARTICLE 261

The contract of insurance against fire is governed by the law of the place where the thing insured is located at the time of its execution.

ARTICLE 262

Life insurance and all other insurance follow the general rule, being regulated by the personal law common to the parties, or in the absence thereof, by the law of the place where the contract of insurance was executed; but the necessary formalities for the exercise or preservation of actions or rights are subject to the law of the locality where the act or omission which gives rise to them took place.

CHAPTER VI. CONTRACTS AND BILLS OF EXCHANGE AND SIMILAR COMMERCIAL INSTRUMENTS

ARTICLE 263

The forms of the order, indorsement, suretyship, intervention for honor, acceptance, and protest of a bill of exchange, are subject to the law of the locality in which each one of those acts takes place.

ARTICLE 264

In the absence of expressed or implied agreement, the legal relations between the drawer and the payee are governed by the law of the place where the bill is drawn.

ARTICLE 265

Likewise, the obligations and rights existing between the acceptor and the holder are regulated by the law of the place in which the acceptance was made.

ARTICLE 266

In the same hypothesis, the legal effects produced by indorsement between indorser and indorsee depend upon the law of the place where the bill has been indorsed.

ARTICLE 267

The greater or less extent of the obligations of each indorser does not alter the original rights and duties of the drawer and the payee.

ARTICLE 268

Guaranty, in the same conditions, is governed by the law of the place in which it is furnished.

ARTICLE 269

The legal effects of acceptance by intervention are regulated, in the absence of agreement, by the law of the place in which the third party intervenes.

ARTICLE 270

The time limits and formalities for acceptance, payment and protest are subject to the local law.

ARTICLE 271

The rules of this chapter are applicable to local drafts, duebills, promissory notes and orders or checks.

CHAPTER VII. FORGERY, ROBBERY, LARCENY OR LOSS OF PUBLIC SECURITIES
AND NEGOTIABLE INSTRUMENTS

ARTICLE 272

Provisions relative to forgery, robbery, larceny or loss of public securities and negotiable instruments are of an international public order.

ARTICLE 273

The adoption of the measures established by the law of the locality in which the fact takes place does not excuse the interested parties from taking all other measures established by the law of the place in which those documents and securities are negotiated, and by that of the place of their payment.

TITLE III. MARITIME AND AIR COMMERCE

CHAPTER I. SHIPS AND AIRCRAFT

ARTICLE 274

The nationality of ships is shown by the navigation license, the roll and the certificate of registration and has the flag as an apparent distinctive symbol.

ARTICLE 275

The law of the flag governs the forms of publicity required for the transfer of property in a ship.

ARTICLE 276

The power of judicial attachment and sale of a ship, whether or not it is loaded and cleared should be subject to the law of the situation.

ARTICLE 277

The rights of the creditors after the sale of the ship, and their extinguishment, are regulated by the law of the flag.

ARTICLE 278

Maritime hypothecation and privileges or securities of a real character constituted in accordance with the law of the flag has extraterritorial effects even in those countries the legislation of which does not recognize nor regulate such hypothecation.

ARTICLE 279

The powers and obligations of the master and the liability of the proprietors and ship's husbands for his acts are also subject to the law of the flag.

ARTICLE 280

The recognition of the ship, the request of a pilot, and the sanitary police depend upon the territorial law.

ARTICLE 281

The obligations of the officers and seamen and the internal order of the vessel are subject to the law of the flag.

ARTICLE 282

The preceding provisions of this chapter are also applicable to aircraft.

ARTICLE 283

The rules on nationality of the proprietors of ships and aircraft and ship's husbands, as well as of officers and crew, are of an international public order.

ARTICLE 284

Provisions relating to the nationality of ships and aircraft for river, lake, and coastwise commerce or commerce between certain points of the territory of the contracting States, as well as for fishing and other submarine exploitations in the territorial sea, also are of an international public order.

CHAPTER II. SPECIAL CONTRACTS OF MARITIME AND AERIAL COMMERCE

ARTICLE 285

The charter party, if not a contract of adhesion, shall be governed by the law of the place of departure of the merchandise.

The acts of execution of the contract shall be subject to the law of the place where they are performed.

ARTICLE 286

The powers of the captain in respect to loans on bottomry bond are determined by the law of the flag.

ARTICLE 287

The contract of a bottomry bond, except as otherwise provided by agreement, is subject to the law of the place in which the loan is made.

ARTICLE 288

In order to determine whether the average is particular or general and the proportion in which the vessel and cargo are to contribute therefor the law of the flag is applied.

ARTICLE 289

A fortuitous collision in territorial waters or in the national air is subject to the law of the flag if common to colliding vessels.

ARTICLE 290

In the same case, if the flags are different the law of the place is applied.

ARTICLE 291

The same local law is in every case applied to wrongful collisions in territorial waters or in the national air.

ARTICLE 292

To a fortuitous or wrongful collision in the open sea or air is applied the law of the flag if all the ships or aircraft carry the same one.

ARTICLE 293

If that is not the case, the collision shall be regulated by the flag of the ship or aircraft struck if the collision has been wrongful.

ARTICLE 294

In the cases of fortuitous collision on the high sea or in the open air between vessels or aircraft of different flags, each shall bear one half of the sum total of the damage apportioned in accordance with the law of one of them, and the other half in accordance with the law of the other.

TITLE IV. PRESCRIPTION

ARTICLE 295

Prescription of actions arising from contracts and commercial acts shall be subject to the rules established in this convention in respect to civil actions.

BOOK THREE—PENAL INTERNATIONAL LAW

CHAPTER I. PENAL LAWS

ARTICLE 296

Penal laws are binding on all persons residing in the territory, without other exceptions than those established in this chapter.

ARTICLE 297

The heads of each of the contracting States are exempt from the penal laws of the others when they are on the territory of the latter.

ARTICLE 298

The diplomatic representatives of the contracting States in each of the others, together with their foreign personnel, and the members of the families of the former who are living in his company enjoy the same exemption.

ARTICLE 299

Nor are the penal laws of the State applicable to offenses committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory.

ARTICLE 300

The same exemption is applied to offenses committed on board of foreign war vessels or aircraft while in territorial waters or in the national air.

ARTICLE 301

The same is the case in respect to offenses committed in territorial waters or in the national air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquillity.

ARTICLE 302

When the acts of which an offense is composed take place in different contracting States, each State may punish the act committed within its jurisdiction, if it by itself constitutes a punishable act.

In the contrary case preference shall be given to the right of the local sovereignty where the offense has been committed.

ARTICLE 303

In case of related offenses committed in the territories of more than one contracting State, only the one committed in its own territory shall be subject to the penal law of each.

ARTICLE 304

No contracting State shall apply in its territory the penal laws of the others.

CHAPTER II. OFFENSES COMMITTED IN A FOREIGN CONTRACTING STATE

ARTICLE 305

Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.

ARTICLE 306

Every national of a contracting State or every foreigner domiciled therein who commits in a foreign country an offense against the independence of that State remains subject to its penal laws.

ARTICLE 307

Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory, an offense, such as white slavery, which said contracting State has bound itself by an international agreement to repress.

CHAPTER III. OFFENSES COMMITTED OUTSIDE THE NATIONAL TERRITORY

ARTICLE 308

Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury to submarine cables, and all other offenses of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter.

ARTICLE 309

In cases of wrongful collision on the high sea or in the air, between ships or aircraft carrying different colors, the penal law of the victim shall be applied.

CHAPTER IV. SUNDRY QUESTIONS

ARTICLE 310

The legal judgment given in a foreign contracting State, except in cases which are opposed to local legislation, shall be taken into account for the legal definition of repetition or relapse.

ARTICLE 311

The penalty of civil interdiction has extraterritorial effects.

ARTICLE 312

Prescription of an offense is subordinated to the law of the State having cognizance thereof.

ARTICLE 313

Prescription of the penalty is governed by the law of the State which has imposed it.

BOOK FOUR—INTERNATIONAL LAW OF PROCEDURE

TITLE I. GENERAL PRINCIPLES

ARTICLE 314

The law of each contracting State determines the competence of courts, as well as their organization, the forms of procedure and the execution of judgments and the appeals from their decisions.

ARTICLE 315

No contracting State shall organize or maintain in its territory special tribunals for members of the other contracting States.

ARTICLE 316

The competence *ratione loci* is subordinated, in the order of international relations, to the law of the contracting State establishing it.

ARTICLE 317

The competence *ratione materiae* and *ratione personae*, in the order of international relations, should not be based by the contracting States on the status as nationals or foreigners of persons interested, to the prejudice of the latter.

TITLE II. COMPETENCE

CHAPTER I. GENERAL RULES CONCERNING COMPETENCE IN CIVIL AND COMMERCIAL MATTERS

ARTICLE 318

The judge competent in the first place should take cognizance of suits arising from the exercise of civil and commercial actions of all kinds, especially the one to whom the litigants expressly or impliedly submit themselves, provided that one of them at least is a national of the contracting State to which the judge belongs or has his domicile therein and unless local law is contrary thereto.

ARTICLE 319

The submission can be made only to a judge having ordinary jurisdiction to take cognizance of a similar class of cases in the same degree.

ARTICLE 320

In no case shall the parties be able to submit themselves expressly or impliedly for relief to any judge or court other than that to whom is subordinated according to local laws the one who took cognizance of the suit in the first instance.

ARTICLE 321

By express submission shall be understood the submission made by the interested parties in clearly and conclusively renouncing their own court and unmistakably designating the judge to whom they submit themselves.

ARTICLE 322

Implied submission shall be understood to have been made by the plaintiff from the fact of applying to the judge in filing the complaint, and by the defendant from the fact of his having, after entering his appearance in the suit, filed any plea unless it is for the purpose of denying jurisdiction. No submission can be implied when the suit is proceeded with as in default.

ARTICLE 323

Aside from cases that express or imply submission, and unless local law is contrary thereto, the judge competent for hearing personal causes shall be the one of the place where the obligation is to be performed, or the one of domicile of defendants and subsidiarily that of the residence.

ARTICLE 324

For the exercise of real actions in respect to personal property, the judge of the place where the property is situated shall be competent, and if it is not known by the plaintiff, then the judge of the domicile, and in the absence thereof, the one of the residence of the defendant.

ARTICLE 325

For the exercise of real actions in respect of real property, and for that of mixed actions to determine boundary and partition of common property, the competent judge shall be the one where the property is situated.

ARTICLE 326

If in the case to which the two preceding articles refer there is any property situated in more than one of the contracting States, recourse may be had to the judges of any of them.

ARTICLE 327

In cases relating to the probate of wills or to intestate estates, the competent court will be that of the place in which the deceased had his last domicile.

ARTICLE 328

In insolvency and bankruptcy proceedings, when the debtor has acted voluntarily, the judge of the domicile of the latter shall be the one competent.

ARTICLE 329

In insolvency or bankruptcy proceedings brought by the creditors the competent judge shall be the one of any of the places who has cognizance of the claim which gives rise to them, preference being given, if among them, to that of the domicile of the debtor if he or the majority of the creditors demand it.

ARTICLE 330

In respect to acts of voluntary jurisdiction, saving also the case of submission and local law, the competent judge shall be the one of the place where the person instituting it has or has had his domicile, or, if none, his residence.

ARTICLE 331

Respecting acts of voluntary jurisdiction in commercial matters, apart from the case of submission, and excepting local law, the competent judge

shall be the one of the place where the obligation should be performed or, in the absence thereof, the one of the place where the event giving rise to them occurred.

ARTICLE 332

Within each contracting State, the preferable competence of several judges shall be in conformity with their national law.

CHAPTER II. EXCEPTIONS TO THE GENERAL RULES OF COMPETENCE IN RESPECT TO CIVIL AND COMMERCIAL MATTERS

ARTICLE 333

The judges and courts of each contracting State shall be incompetent to take cognizance of civil or commercial cases to which the other contracting States or their heads are parties defendant, if the action is a personal one, except in case of express submission or of counterclaims.

ARTICLE 334

In the same case and with the same exception, they shall be incompetent when real actions are exercised, if the contracting State or its head has acted on the case as such and in its public character.

ARTICLE 335

If the foreign contracting State or its head has acted as an individual or private person, the judges or courts shall be competent to take cognizance of the cases where real or mixed actions are brought, if such competence belongs to them in respect to foreign individuals in conformity with this convention.

ARTICLE 336

The rule of the preceding article shall be applicable to universal causes (*juicios universales*, e. g., distribution of a bankrupt's or decedent's effects), whatever the character in which the contracting foreign State or its head intervenes in them.

ARTICLE 337

The provisions established in preceding articles shall be applied to foreign diplomatic agents and to the commanders of war vessels or aircraft.

ARTICLE 338

Foreign consuls shall not be exempt from the civil jurisdiction of the judges and courts of the country in which they act, except in respect to their official acts.

ARTICLE 339

In no case can judges or courts adopt coercive or other measures which have to be executed within the legations or consulates or their archives, nor in respect to diplomatic or consular correspondence, without the consent of the respective diplomatic or consular agents.

CHAPTER III. GENERAL RULES OF COMPETENCE IN PENAL MATTERS

ARTICLE 340

The judges and courts of the contracting State in which crimes or misdemeanors have been committed are competent to take cognizance of and pass judgment upon them.

ARTICLE 341

Competence extends to all other crimes and misdemeanors to which the penal law of the State is to be applied in conformity with the provisions of this convention.

ARTICLE 342

It also excepts crimes or misdemeanors committed in a foreign country by nationals enjoying the benefit of immunity.

CHAPTER IV. EXCEPTIONS TO THE GENERAL RULES OF COMPETENCE IN PENAL MATTERS

ARTICLE 343

Persons and crimes and misdemeanors to which the penal law of the respective State does not extend are not subject, in penal matters, to the competence of the judges and the courts of the contracting States.

TITLE III. EXTRADITION

ARTICLE 344

In order to render effective the international judicial competence in penal matters, each of the contracting States shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this Title, subject to the provisions of international treaties or conventions which contain a list of penal infractions authorizing extradition.

ARTICLE 345

The contracting States are not obliged to hand over their own nationals. The nation which declines to hand over one of its own citizens must try him.

ARTICLE 346

When, previous to the receipt of a request, a person accused or convicted has committed an offense in the country from which his delivery has been requested, the said delivery may be postponed, until he is tried and has served sentence.

ARTICLE 347

If various contracting States should request the extradition of a delinquent for the same offense, he should be delivered to that one in whose territory the offense has been committed.

ARTICLE 348

In case the extradition is requested for different acts, the preference shall belong to the contracting State in whose territory the most grievous offense has been committed, according to the legislation of the State upon which the request was made.

ARTICLE 349

If all the acts imputed should be equally grave, the preference shall be given to the contracting State which first presents the request for extradition. If all have applied simultaneously, the State upon which the request was made shall decide, but the preference should be given to the State of origin, or in the absence thereof to that of the domicile, of the accused, if such state is among those requesting extradition.

ARTICLE 350

The foregoing rules in respect to preference shall not be applicable if the contracting State is obligated toward a third one, by reason of treaties in force prior to the adoption of this convention, to establish a different method.

ARTICLE 351

In order to grant extradition it is necessary that the offense has been committed in the territory of the States requesting it, or that its penal laws are applicable to it in accordance with the provisions of Book III of this convention.

ARTICLE 352

Extradition extends to persons accused or convicted as principals, accomplices or abettors of a crime.

ARTICLE 353

It is necessary that the act which gives rise to the extradition is a criminal offense in the legislation of the State making the request and in that upon which it is made.

ARTICLE 354

It shall be likewise necessary that the penalty attached to the alleged acts, according to their provisional or final description by the competent judge or court of the State requesting the extradition, is not less than one year of deprivation of liberty and that the arrest or detention of the accused has been ordered or decided upon, if not final sentence has been delivered. The sentence should be deprivation of liberty.

ARTICLE 355

Political offenses, as defined by the requested State, are excluded from extradition.

ARTICLE 356

Nor shall it be granted, if it is shown that the request for extradition has been in fact made for the purpose of trying or punishing the accused for an offense of a political character in accordance with the same definition.

ARTICLE 357

Homicide or assassination of the Chief of a contracting State or of any person therein exercising authority shall not be considered as a political offense, nor as an act related thereto.

ARTICLE 358

Extradition shall not be granted if the person demanded has already been tried and acquitted, or served his sentence, or is awaiting trial, in the territory of the requested State for the offense upon which the request is based.

ARTICLE 359

Nor should extradition be granted if the offense or the penalty is already barred by limitation by the laws of the requesting or requested State.

ARTICLE 360

Legislation of the requested State subsequent to the offense shall not prevent extradition.

ARTICLE 361

Consuls general, consuls, vice consuls, or consular agents may request the arrest and delivery on board of a vessel or aircraft of their country of the officers, sailors, or members of the crew of its war or merchant ships or aircraft who may have deserted therefrom.

ARTICLE 362

For the purposes of the preceding article, they shall exhibit to the proper local authority, delivering also to it an authenticated copy thereof, the

register of the ship or aircraft, the crew list, or any other official document upon which the request is founded.

ARTICLE 363

In adjoining countries special rules may be agreed upon for extradition in the regions or localities of the boundary.

ARTICLE 364

The request for extradition should be made through diplomatic agents duly authorized for that purpose by the laws of the requesting State.

ARTICLE 365

Together with the final request for extradition the following should be submitted:

1. A sentence of conviction or a warrant or order of arrest or a document of equal force, or one which obliges the interested party to appear periodically before the criminal court, together with such parts of the records in the case as furnish proof or at least some reasonable evidence of the guilt of the person in question.

2. The filiation of the person whose extradition is requested, or such marks or circumstances as may serve to identify him.

3. An authenticated copy of the provisions establishing the legal definition of the act which gives rise to the request for extradition, describing the participation imputed therein to the defendant, and prescribing the penalty applicable.

ARTICLE 366

The extradition may be requested by telegraph and, in that case, the documents mentioned in the preceding Article shall be presented to the requested country or to its Legation or Consulate General in the requesting country within two months following the detention of the accused. Otherwise he shall be set at liberty.

ARTICLE 367

Moreover, if the requesting State does not dispose of the person demanded within three months following his being placed at its disposal, he shall be set at liberty.

ARTICLE 368

The person detained may use, in the State to which the request for extradition is made, all legal means provided for its nationals for the purpose of regaining their freedom, basing the exercise thereof on the provisions of this convention.

ARTICLE 369

The person detained may also thereafter use the legal remedies which are considered proper, in the State which requests the extradition against the qualifications and resolutions upon which the latter is founded.

ARTICLE 370

The delivery should be made together with all the effects found in the possession of the person demanded, whether as proceeds of the alleged crime, or whether to be used as evidence, in so far as practicable in accordance with the laws of the State effecting the delivery and duly respecting the rights of third persons.

ARTICLE 371

The delivery of the objects referred to in the preceding Article can be made if the requesting State asks for the extradition, even though the detained person dies or escapes before it is effected.

ARTICLE 372

The expenses of detention and delivery shall be borne by the requesting State, but the latter shall not have to defray any expenses for the services rendered by the public paid employees of the government from which extradition is requested.

ARTICLE 373

The charge for the services of such public employees or officers as receive only fees or prerequisites shall not exceed their customary fees for their acts or services under the laws of the country in which they reside.

ARTICLE 374

All liability arising from the fact of a provisional detention shall rest upon the requesting State.

ARTICLE 375

The passage of the extradited person and his custodians through the territory of a third contracting State shall be permitted upon the presentation of the original document allowing the extradition, or of an authenticated copy thereof.

ARTICLE 376

The State which obtains extradition of an accused person, who is afterwards acquitted, shall be obliged to communicate to the State which granted it an authentic copy of judgment.

ARTICLE 377

The person delivered can not be detained in prison nor tried by the contracting State to which he is delivered for an offense different from the one

giving rise to the extradition and committed prior thereto, unless it is done with the consent of the requested State, or unless the extradited person remains in the territory of the former for three months after his trial and acquittal for the offense which gave rise to the extradition, or after having served the sentence of deprivation of liberty imposed upon him.

ARTICLE 378

In no case shall the death penalty be imposed or executed for the offense upon which the extradition is founded.

ARTICLE 379

Whenever allowance for temporary detention is proper, it shall be computed from the time of the detention of the extradited person in the State to which the request was made.

ARTICLE 380

The detained person shall be placed at liberty, if the requesting State does not present the request for extradition in a reasonable time, within the minimum of time after the request for temporary arrest, taking into account the distance and facilities of postal communication between the two countries.

ARTICLE 381

If the extradition of a person has been refused, a second request on account of the same crime cannot be made.

TITLE IV. THE RIGHT TO APPEAR IN COURT AND ITS MODALITIES

ARTICLE 382

The nationals of each contracting State shall enjoy in each of the others the benefit of having counsel assigned to them upon the same conditions as natives.

ARTICLE 383

No distinction shall be made between nationals and foreigners in the contracting States in respect of giving security for appearance at trial.

ARTICLE 384

Aliens belonging to a contracting State may exercise in the others public rights of actions in matters of a penal nature upon the same conditions as the nationals.

ARTICLE 385

Nor shall those aliens be required to furnish security when exercising a private right of action in cases in which it is not required from nationals.

ARTICLE 386

None of the contracting States shall require from the nationals of another the security *judicio sisti* nor the *onus probandi* in cases where they are not required from its own nationals.

ARTICLE 387

No provisional attachments, bail, or any other measures of a similar nature shall be authorized in respect to the nationals of the contracting States by reason merely of their being foreigners.

TITLE V. LETTERS REQUISITORIAL AND LETTERS ROGATORY

ARTICLE 388

Every judicial step which a contracting State has to take in another shall be effected by means of letters requisitorial or letters rogatory, transmitted through the diplomatic channel. Nevertheless, the contracting States may agree upon or accept as between themselves any other form of transmission in respect to civil or criminal matters.

ARTICLE 389

The judge issuing the letters requisitorial is to decide as to his own competency and the legality or propriety of the act or evidence, without prejudice to the jurisdiction of the judge to whom issued.

ARTICLE 390

The judge to whom such letters requisitorial are sent shall decide as to his own competence *ratione materiae* in respect to the act which he is requested to perform.

ARTICLE 391

The one receiving the letters requisitorial or letters rogatory should comply as to the object thereof with the law of the one issuing the same and as to the manner of discharging the request he should comply with his own law.

ARTICLE 392

The letters requisitorial shall be addressed in the language of the State issuing them and shall be accompanied by a translation made in the language of the State to whom issued, duly certified by sworn translator.

ARTICLE 393

The parties interested in the execution of letters requisitorial and letters rogatory of a private nature should give powers of attorney, expenses which these attorneys and their activities occasion being chargeable to them.

TITLE VI. EXCEPTIONS HAVING INTERNATIONAL CHARACTER

ARTICLE 394

Litispendencia by reason of a suit in another of the contracting States may be pleaded in civil matters when the judgment rendered in one of them is to take effect in the other as *res judicata*.

ARTICLE 395

In criminal cases the plea of *litispendencia* by reason of a cause pending in another contracting State shall not lie.

ARTICLE 396

The plea of *res judicata* founded on a judgment of another contracting party shall lie only when the judgment has been rendered in the presence of the parties or their legal representatives, and no question founded on the provisions of this convention has arisen as to the competence of the foreign court.

ARTICLE 397

In all cases of juridical relations subject to this convention, questions of competence founded on its precepts may be addressed to the jurisdiction of the court.

TITLE VII. EVIDENCE

CHAPTER I. GENERAL PROVISIONS IN RESPECT TO EVIDENCE

ARTICLE 398

The law governing the offense or the legal relation constituting the subject of the civil or commercial suit determines upon whom the burden of proof rests.

ARTICLE 399

In order to determine the modes of proof which may be used in each case, the law of the place in which the act or fact to be proved has taken place shall apply, except those which are not authorized by the law of the place in which the suit is instituted.

ARTICLE 400

The form of the evidence is regulated by the law in force in the place where it is taken.

ARTICLE 401

The weight of the evidence depends on the law of the judge.

ARTICLE 402

Documents executed in each of the contracting States shall have in the others the same value in court as those executed therein, if they fulfill the following requirements:

1. That the subject matter of the act or contract in question is lawful and permitted by the laws of the country where it is executed and of that where it is used.

2. That the contracting parties have ability and capacity to bind themselves in conformity with their personal law.

3. That in the execution thereof the forms and formalities established in the country where the acts or contracts have been executed have been observed.

4. That the document is legalized and contains the requisites necessary to its authenticity in the place where it is issued.

ARTICLE 403

The executory force of a document is subordinated to the local law.

ARTICLE 404

The capacity of witnesses and the challenging thereof depend upon the law to which the legal relation constituting the object of the suit is subject.

ARTICLE 405

The form of the oath shall conform to the law of the judge or court before whom it is administered, and its validity is subject to the law governing the fact in respect to which the oath is taken.

ARTICLE 406

The presumptions derived from an act are subject to the law of the place where the act giving rise to them occurs.

ARTICLE 407

Circumstantial evidence is subject to the law of the judge or court.

CHAPTER II. SPECIAL RULES ON EVIDENCE OF FOREIGN LAWS

ARTICLE 408

The judges and courts of each contracting State shall apply *ex officio*, in suitable cases, the laws of the others, without prejudice to the means of proof referred to in this chapter.

ARTICLE 409

The party invoking the application of the law of any contracting State in one of the others or dissenting from it, may show the text thereof, force and

sense, by means of a certificate subscribed by two practicing lawyers of well known standing of the country whose legislation is in question, which certificate shall be duly authenticated.

ARTICLE 410

In the absence of proof, or if the judge of the court deems it insufficient, they may request *ex officio* before deciding, through the diplomatic channel, that the State whose legislation is in question furnish a report on the text, force and sense of the applicable law.

ARTICLE 411

Each contracting State binds itself to furnish to the others, as soon as possible, the information referred to in the preceding article, which information should come from its supreme court, or from some one of its divisions or sections, or from the state attorney, or from the department or ministry of justice.

TITLE VIII. APPEAL FOR ANNULMENT

ARTICLE 412

In every contracting State where the appeal for annulment or other similar institution exists, it may be interposed for the infraction, erroneous interpretation, or improper application of a law of another contracting State, upon the same conditions and in the same cases as in respect of the national law.

ARTICLE 413

The rules established in Chapter II of the preceding Title shall be applicable to the appeal for annulment although the inferior judge or the lower court may have already applied them.

TITLE IX. BANKRUPTCY OR INSOLVENCY

CHAPTER I. UNITY OF BANKRUPTCY OR INSOLVENCY

ARTICLE 414

If the insolvent or bankrupt has only one civil or commercial domicile, there can not be more than one preventive proceeding in insolvency or bankruptcy or one of suspension of payments, or a composition in respect of all his assets and of his liabilities in the contracting States.

ARTICLE 415

If one and the same person or partnership should have in more than one contracting State various commercial establishments entirely separate eco-

nomically, there may be as many suits for preventive proceedings of bankruptcy as there are commercial establishments.

CHAPTER II. UNIVERSALITY OF BANKRUPTCY OR INSOLVENCY AND
THEIR EFFECTS

ARTICLE 416

A decree establishing the incapacity of the bankrupt or insolvent, has extraterritorial effects in the contracting States.

ARTICLE 417

A decree of bankruptcy or insolvency, rendered in one of the contracting States, shall be executed in the others in the cases and manner established in this convention in respect to judicial resolutions; but it shall have the effect of *res judicata* from the moment it is made final, as to the persons which it is to affect.

ARTICLE 418

The powers and functions of the trustees appointed in one of the contracting States in accordance with the provisions of this convention shall have extraterritorial effect in the others, without the necessity of any local proceeding.

ARTICLE 419

The retroactive effect of a declaration of bankruptcy or insolvency and the annulment of certain acts in consequence of those judgments shall be determined by the law thereof and shall be applicable to the territory of all the other contracting States.

ARTICLE 420

Real actions and rights of the same nature shall continue to be subject, notwithstanding the declaration in bankruptcy or insolvency, to the law of the situation of the things affected thereby and to the competence of the judges of the place in which they are found.

CHAPTER III. AGREEMENT AND REHABILITATION

ARTICLE 421

The agreement among the creditors and the bankrupt or insolvent shall have extraterritorial effect in the other contracting States, saving the right to a real action by the creditors who may not have accepted.

ARTICLE 422

The rehabilitation of the bankrupt has also extraterritorial validity in the other contracting States, as soon as the judicial resolution by which it is ordered becomes final, and in conformity with its terms.

TITLE X. EXECUTION OF JUDGMENTS RENDERED BY FOREIGN COURTS

CHAPTER I. CIVIL MATTERS

ARTICLE 423

Every civil or contentious administrative judgment rendered in one of the contracting States shall have force and may be executed in the others if it combines the following conditions:

1. That the judge or the court which has rendered it have competence to take cognizance of the matter and to pass judgment upon it, in accordance with the rules of this convention;
2. That the parties have been summoned for the trial either personally or through their legal representative;
3. That the judgment does not conflict with the public policy or the public laws of the country in which its execution is sought;
4. That it is executory in the State in which it was rendered.
5. That it be authoritatively translated by an official functionary or interpreter of the State in which it is to be executed, if the language employed in the latter is different.
6. That the document in which it is contained fulfills the requirements necessary in order to be considered as authentic in the State from which it proceeds, and those which the legislation of the State in which the execution of the judgment is sought requires for authenticity.

ARTICLE 424

The execution of the judgment should be requested from a competent judge or tribunal in order to carry it into effect, after complying with the formalities required by the internal legislation.

ARTICLE 425

In the case referred to in the preceding article, every recourse against the judicial resolution granted by the laws of that State in respect to final judgments rendered in a declarative action of greater import shall be granted.

ARTICLE 426

The judge or tribunal from whom the execution is requested shall, before decreeing or denying it, for a term of twenty days hear the party against whom it is directed, as well as the prosecuting attorney.

ARTICLE 427

The summons of the party who should be heard shall be made by means of letters requisitorial or letters rogatory, in accordance with the provisions of this convention, if he has his domicile in a foreign country and lacks sufficient representation in the country, or in the form established by the local law if he has his domicile in the requested State.

ARTICLE 428

After the term fixed for appearance by the judge or the court, the case shall be proceeded with whether or not the party summoned has appeared.

ARTICLE 429

If the execution is denied, the judgment shall be returned to the party who presented it.

ARTICLE 430

When the execution of the judgment is granted, the former shall be subject to the procedure determined by the law of the judge or the court for its own judgments.

ARTICLE 431

Final judgments rendered by a contracting State which by reason of their pronouncements are not to be executed shall have in the other States the effects of *res judicata* if they fulfill the conditions provided for that purpose by this convention, except those relating to their execution.

ARTICLE 432

The procedure and effects regulated in the preceding articles shall be applied in the contracting States to awards made in any of them by arbitrators or friendly compositors, whenever the case to which they refer can be the subject of a compromise in accordance with the legislation of the country where the execution is requested.

ARTICLE 433

The same procedure shall be also applied in respect to civil judgments rendered in any of the contracting States by an international tribunal, when referring to private persons or interests.

CHAPTER II. ACTS OF VOLUNTARY JURISDICTION

ARTICLE 434

The provisions made in acts of voluntary jurisdiction regarding commercial matters by judges or tribunals of a contracting State or by its consular agents shall be executed in the others in accordance with the procedure and the manner indicated in the preceding article.

ARTICLE 435

The resolutions adopted in acts of voluntary jurisdiction in civil matters in a contracting State shall be accepted by the others if they fulfill the conditions required by this convention for the validity of documents executed in a foreign country and were rendered by a competent judge or tribunal, and they shall in consequence have extraterritorial validity.

CHAPTER III. PENAL MATTERS

ARTICLE 436

No contracting State shall execute the judgments rendered in one of the others in penal matters in respect to the sanctions of that class which they impose.

ARTICLE 437

They may, however, execute the said judgments in respect to civil liability and the effects thereof upon the property of the convicted person if they have been rendered by a competent judge or tribunal in accordance with this convention and upon a hearing of the interested party and if the other conditions of form and procedure established by the first chapter of this title have been complied with.

INTERNATIONAL COMMISSION OF JURISTS

(Sessions held at Rio de Janeiro, April 18 to May 20, 1927)

Projects Concerning Permanent Technical Organs *

The International Commission of Jurists, having in view the necessity, demonstrated by experience, of permanently organizing the preliminary work for formulating and developing international law in America, as well as the unification of legislation, recommends that the Sixth Pan American Conference approve the following plan:

1st. To make the International Commission of Jurists of Rio de Janeiro a permanent body, and to provide for a stated, regular session every two years.

2nd. To organize two committees of examination, one at Rio de Janeiro and the other at Montevideo, for international public law and international private law, respectively, with the following duties:

(a) To present to the various governments a list of matters susceptible of being submitted to contractual regulation. In this list will be included, besides the matters initiated by the Committees, those which the International Commission of Jurists judges proper to indicate, on terminating each of its sessions.

(b) To decide, in accordance with replies received, what matters are generally considered ripe for discussion and appropriate for legislation.

(c) To submit to the various governments the different viewpoints from which matters selected may be contemplated; to petition and obtain an indication along general lines of the opinion of each government.

3rd. To entrust the Executive Council of the American Institute of International Law with the duty of studying scientifically the matters referred to in the above article, with the task of drawing conclusions and presenting them with proper explanations duly supported in reports, inasmuch as they are to serve as bases of discussion by the International Commission of Jurists for the definite formulation of the ante-projects intended for Pan American Conferences.

Whenever possible, the above information shall be submitted to the deliberations of the Institute at its biennial plenary sessions.

4th. To organize in Havana an office and committee for directing the studies of comparative legislation and for the unification of legislation.

5th. The three above mentioned committees are to be formed by the various governments from the members of their respective national societies of international law.

They shall communicate with the various governments and with the Executive Council of the Institute, through the Pan American Union.

* Translated from *Comisión Internacional de Jurisconsultos Americanos, Ministerio de Relaciones Exteriores del Brasil, Rio de Janeiro, 1927, Vol. 4, pp. 133, 139.*

6th. The Pan American Union, in so far as its by-laws permit, shall coöperate in all the preliminary legislative work referred to in the above articles.

Resolution Concerning the Unification of Legislation

In addition to the office and council to be created for the study of comparative law and for the unification of the laws, the Pan American Union should appoint a committee composed of three jurists versed in the civil legislation of the countries of America for the purpose of proceeding to the study of such legislation and publishing the result of their labors. In addition thereto, it should formulate a project of uniform civil legislation for the countries of America, principally Latin America, as well as furnish the best means of obviating the inconveniences resulting from the legislations when they present an irreconcilable character.

INSTITUTE OF INTERNATIONAL LAW

Resolutions Adopted at Lausanne

Aug. 24—Sept. 2, 1927.

INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES ON THEIR TERRITORY TO THE PERSON OR PROPERTY OF FOREIGNERS

The Institute of International Law expresses the hope of seeing sanctioned in the practice of the law of nations the whole of the following rules concerning the international responsibility of States by reason of injuries caused upon their territory, in time of peace, to the persons or property of foreigners.

I

The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds: constitutional, legislative, governmental, administrative, or judicial.

This responsibility of the State exists even when its organizations act contrary to the law or to the order of a superior authority.¹

It exists likewise when these organs act outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs.

This responsibility of the State does not exist if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault.

II

The State is responsible for the act of corporate bodies exercising public functions on its territory.

III

The State is not responsible for injurious acts committed by individuals except when the injury results from the fact that it has omitted to take the measures to which, under the circumstances, it was proper normally to resort in order to prevent or check such actions.

¹ The text of the second paragraph should be understood in the sense that the responsibility of the State exists whether its organs have acted in conformity with or contrary to the law or even the order of a superior authority. (Extract from the *procès-verbal* of September 1, 1927.)

IV

Aside from cases where international law would call for a treatment of a foreigner preferable to that of a national, the State should apply to foreigners against injurious acts emanating from individuals, the same measures of protection as to its nationals. Foreigners should in consequence have at least the same right as the latter to obtain indemnity.

V

The State is responsible on the score of denial of justice:

- (1) When the tribunals necessary to assure protection to foreigners do not exist or do not function.
- (2) When the tribunals are not accessible to foreigners.
- (3) When the tribunals do not offer the guaranties which are indispensable to the proper administration of justice.

VI

The State is likewise responsible if the procedure or the judgment is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular state.

VII

The State is not responsible for injuries caused in case of mob, riot, insurrection or civil war, unless it has not sought to prevent the injurious acts with the diligence proper to employ normally in such circumstances, or unless it has not acted with like diligence against these acts or unless it does not apply to foreigners the same measures of protection as to nationals. It is especially obligated to give to foreigners the benefits of the same indemnities as to nationals with regard to communes or other persons. The responsibility of the State by reason of acts committed by insurgents ceases when it recognizes the latter as a belligerent party, and in all cases in regard to States which have recognized them as such.

The question of the degree to which a State is responsible for acts of insurgents, even when recognized as a belligerent party, in case they have become the government of the country, is reserved.

VIII

The principles stated in Articles 3 and 4 govern also the international obligation resting upon the State to guarantee the rights foreigners have with regard to it by virtue of its internal law.

IX

A federal State is responsible for the conduct of the individual States, not only if it is contrary to its own international obligations, but also if it is

contrary to the international obligations incumbent upon those States. It cannot escape this responsibility by invoking the fact that its constitution does not give it the right to control the particular States nor the right to require them to discharge their obligations.

Likewise a protecting State is responsible for the conduct of a protected State so far as the latter is bound to execute the international obligations of the protecting State, or so far as the latter represents the protected State towards third States wronged by it and employing the right to press their claims.

X

The responsibility of the State includes reparation for injuries suffered in so far as they are the consequences of a failure to observe an international obligation. It includes moreover, when need be, according to the circumstances and the general principles of the law of nations, a satisfaction to be given to the State which has been wronged in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise.

XI

The damages include, when applicable, an indemnity for the injured persons as reparation for the moral suffering they have experienced.

When the responsibility of the State results solely from the fact that it has not taken the required steps after the accomplishment of the injurious act, it is only bound to make reparation for the injury resulting from the total or partial omission of these measures.

A State responsible for the conduct of other States is bound to see to the execution by them of the payments entailed by this responsibility and chargeable to them; if it is not possible for it to do so, it is bound to grant an equivalent compensation.

In principle the indemnity to be granted should be placed at the disposal of the wronged State.

The questions relating to the calculation of damages and to the relations of injured persons to their State and to the State against which the claim is brought are reserved.

XII

No demand for reparation can be brought through diplomatic channels of a State so long as the wronged individual has at his disposal effective and sufficient means to obtain for him the treatment due him.

Nor can any demand for reparation take place if the responsible State places at the disposal of the wronged individual an effective means of obtaining the corresponding damages.

FINAL VOEU

The Institute expresses the hope that by international conventions, where they do not already exist, the States will bind themselves in advance to submit all disputes concerning international responsibility of the State resulting from injuries caused on their territory to the persons and property of foreigners, first, to an international commission of inquiry, if that is necessary for an examination of the facts; next, to a process of conciliation; finally, if that does not succeed, to a judicial procedure before the Permanent Court of Arbitration, the Permanent Court of International Justice, or any other international court of justice, for a definitive solution.

The Institute also expresses the hope that States will abstain from every coercive measure before having had recourse to the preceding measures.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

INTERNATIONAL AIR NAVIGATION

I

It belongs to each State to regulate international air circulation above its territory, taking into account on the one hand the necessities of international air circulation (including landing), and, on the other hand, the requirements of its security as well as that of the persons and property of its inhabitants.

The rules established in this respect shall be applied without distinction of nationality.

II

All aircraft engaged in the transportation of persons and property have the benefit of the régime of international circulation as it is defined in Article I. Each State can subject to its previous consent the organization of a regular public service of international communication with any point whatever of its territory.

Aircraft attached by a State or in virtue of a State concession to a regular public service for the transportation of persons, merchandise or mail cannot, before their arrival at destination, be made the object of any measure of attachment or execution of a nature to interfere with the normal conduct of this service.

III

Aircraft attached to the service of the government of a State and aircraft forming part of the war material of a State or under military control are not entitled to the benefits of the régime of international circulation above defined.

In case of regular authorization, military aircraft flying above a foreign territory or landing upon it shall enjoy extraterritoriality.

IV

Every aircraft should have one nationality and one only. This nationality shall be that of the country where the aircraft is registered.

Each State determines to what persons and under what conditions it accords, suspends or withdraws registration. In no case, however, in the absence of a special convention to the contrary, can a State grant registration to aircraft having their home port on the territory of another State.

In case of change of home port, the aircraft keeps its nationality until it has acquired a new one.

Every aircraft should bear visible marks of its nationality.

V

Until the requisite guaranties of an international order for registration and supervision of aircraft by the State which grants them its nationality have been determined by a general convention, each State remains free to forbid aërial circulation above its territory to the aircraft of States whose legislation on registration and supervision do not offer sufficient guaranties.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

NAVIGATION ON THE HIGH SEAS

The Institute of International Law declares that the principle of the freedom of the high seas includes notably the following consequences:

- I. Freedom of navigation on the high seas under the exclusive control, in the absence of a convention to the contrary, of the State whose flag the vessel flies.
- II. Freedom to fish in the high seas under the same conditions.
- III. Freedom of laying submarine cables in the high seas.
- IV. Freedom of aerial navigation over the high seas.

VOEU

Whereas, it would be expedient to increase the guaranties for safety of navigation of fishermen and protection of submarine cables by prescribing: first, that warships or merchant ships shall avoid certain routes; secondly, that submarines of both classes shall navigate only on the surface in some waters to be determined.

The Institute calls the attention of the Governments to these questions and expresses the hope that the Convention of London of January 20, 1914¹ be completed in this sense.

¹ British and Foreign State Papers, Vol. 108, p. 283; Hertslet, *Commercial Treaties*, Vol. 27, p. 416; English translation in *Parliamentary Papers*, 1914 (Cd. 7246), Vol. 70, p. 183.

INSTITUTE OF INTERNATIONAL LAW
Resolution adopted at Lausanne
RADIO-TELEGRAPHIC COMMUNICATION

I

Each State has the right, in the absence of a particular convention, to regulate (authorize, prohibit, control, etc.) according to its pleasure the establishment and operation of radio-telegraphic stations situated within its territory, irrespective of their ownership.

II

It also has the right, in the absence of conventional limitations, to suspend international radio-telegraphic service whenever it considers it necessary for the preservation of its essential interests or for the performance of its international duties.

III

It does not, on the contrary, have any right to prevent the simple passage of wave lengths over its territory.

IV

The exploitation of radio-telegraphic stations situated within a State should be organized in such a way as to disturb as little as possible the service of other States. For this reason, it is desirable that the States should reach amicable agreements by means of international conventions.

V

If the radio-telegraphic emissions of a State cause grave trouble to the emissions of another State, this creates an international responsibility and exposes it to the penalties of ordinary sanctions, the responsibility depending upon the technical possibility in each case.

The State is likewise responsible if it does not employ the means at its disposition to prevent radio-telegraphic emissions which, by their content, are of a nature to disturb the public order of another State, when similar emissions have already been called to its attention by the latter.

VI

The aforementioned rules apply equally to radio-telegraph and radio-telephone.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

SUBMARINE CABLES

The Institute adopts the following *vœu*:

I

That the various States agree to ratify the rules proposed at the Conference of London in 1913,¹ rules which would effectively complete those proposed by the Conference of Paris of 1884.²

II

That the various States insist that the proprietors or lessees of submarine cables simplify as far as possible and unify the preliminary formalities for the reimbursement for losses of machinery or apparatus destroyed or voluntarily abandoned by fishermen or navigators for the purpose of preserving submarine cables.

III

That the different States agree, with regard to the prevention of *délits* or *quasi-délits* committed in the matter of submarine cables, to establish the uniformity advocated by Professor Renault from 1879.

¹ Parliamentary Papers, 1913 (Cd. 7079).

² Malloy, *Treaties and Conventions between the United States and other Powers*, Vol. 2, p. 1949 (English); *British and Foreign State Papers*, Vol. 75, p. 356 (French).

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

ARBITRAL PROCEDURE

I

The Institute notes that the "Draft Regulations for Arbitral Procedure" of 1875 has opened the way to arbitral procedure as it has developed since that time,—that its principal rules have received the sanction of positive law, and that its chief aim has thus been achieved. But, inasmuch as the continuous progress of arbitration calls for the development of rules of formal law, it decides to continue the work commenced and to undertake the preparation of a code of international procedure.

II

The Institute notes that its recommendation made in 1877 to insert in treaties a *compromis* clause stipulating for recourse to arbitration in case of dispute upon the interpretation and application of those treaties has found a very favorable welcome among the States. But, inasmuch as the principle of obligatory arbitration, integral and unconditional, is not yet sanctioned, the Institute maintains and renews its urgent recommendation to the States which are not yet bound by conventions of conciliation and obligatory judicial settlement, to insert in their treaties such a clause stipulating recourse to a competent international tribunal in case of dispute as to the interpretation and application of these treaties.

III

The Institute, seeing in the institution of the Permanent Court of International Justice the realization of the *Vœu* uttered by it at Christiania in 1912, deems that its resolution has accomplished its purpose.

IV

The Institute of International Law is of the opinion that in case of divergent interpretations of conventions relating to international unions the Governments should have recourse to the decision of a competent international authority.

V

The Institute, considering that there is a grave omission in international judicial organization in respect of protection of private interests viewed from the international standpoint, and that progress should be made by degrees in this matter, believes it necessary to make a study of this problem and to place it on the program of its labors.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

PROCEDURE OF CONCILIATION

I

Commissions of conciliation are established by means of bilateral or collective conventions.

II

Commissions of conciliation are to be created as performing organs for a limited time, or not determined in advance, to provide for differences which may arise after they come into force.

III

The contracting States themselves designate the members of which the commission of conciliation is composed and the number of which should by preference be set at five. While they are each free to appoint a member of its own choice, they select the remaining members, including the president, by common accord.

All the commissioners should enjoy high moral reputation and possess a good knowledge of the political affairs of the interested countries between which they attempt to maintain peace and good understanding. Those chosen in common should be taken from the nationals of third states not domiciled on the territory of either contracting State nor in the service of either of them.

In case, in order to settle the difference, need is felt to throw light on the work of the commission by recourse to the knowledge of persons specially competent, the contracting States, when they deem the dispatch of one or more experts for this purpose insufficient, can stipulate that each of them shall have the power to provide for it either by replacing for a short time the member freely appointed by it with another person specially qualified, or by attaching to the existing commissions an additional member of its choice. The attitude taken on this point by a contracting State would dictate that of the other.

IV

All differences between the contracting States, of what nature soever, which it may have been impossible to settle through the ordinary diplomatic channels, should be submitted to a commission of conciliation, unless the parties in controversy have bound themselves by convention or special agreement to lay the dispute directly before an arbitral or judicial tribunal.

V

The commission of conciliation may in each particular case enter upon its functions when it has been called upon by means of a request emanating from either of the parties interested and addressed to the president.

After an impartial and conscientious examination of the questions in dispute as to the facts and the claims of the parties, it shall act only to bring about a complete and final conciliation.

A report, signed by the majority of the commissioners and containing if needful the terms of the proposed arrangement, shall be confidentially communicated to the parties with an invitation to make a decision within a given period of time. The statement of facts, the legal reasoning and the agreement suggested to the parties shall not have the character of an obligatory award with respect to them, neither taken as a whole nor separately.

At the end of its labors the commission shall draw up a *procès-verbal* stating merely either that the parties have come to an agreement, in which case the conditions of the agreement shall be incorporated therein, or that the parties have not been able to become reconciled.

No publicity shall be given either to the whole of the labors of the commission or to the report, or to the *procès-verbal*, other than by virtue of a decision taken by the commission with the consent of the parties.

VI

The commission is free to regulate its procedure by taking into account for its inquiry the provisions of Title III of the Hague Convention of 1907.

The parties are bound to facilitate in every way the work of the commission and to this end they should: (a) abstain, even by way of reprisals, from every coercive or annoying measure from the moment that one of them has appealed to the president; (b) cease from any analogous measure already begun and in general perform no act which can compromise the success of the efforts of the commission to bring about conciliation.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

LOCUS REGIT ACTUM

I

The maxim "*locus regit actum*" is still generally accepted.

II

It applies not only to the form of the writing used as evidence of an act or a juridical fact, but also to the form of the juridical act itself, when the latter is valid only on the condition of having been made in a particular form.

III

It does not apply and should not apply to enabling forms.

IV

It is imperative as regards authentic acts and optional as regards acts under private seal.

The law of the place of the act determines absolutely the forms of authentication. Instruments issued by consuls or diplomatic agents are excepted from this rule.

V

The law which governs the act as to its substance can expressly dispense with the authentication required by the law of the place of the act.

VI

The law which governs the act as to its substance can prescribe the authentication, but only by express provision, even if it is performed in a foreign country where the authentic form is not required.

VII

The law of the place of the act cannot dispense with observance of the formalities prescribed by the law of the place where realty is situated to effect transmission of the title or of a real right in that realty.

VIII

Nor does it dispense with the observance of the formalities prescribed for the passing of the title of a particular object *in specie* by the laws of the country where that object is located at the time of the act.

IX

The law of the place of the acknowledgment of a natural child determines the forms of the acknowledgment when according to the national law it can take place in the birth certificate or in a separate authentic act.

X

If according to the competent law legitimation results from subsequent marriage the *lex loci actus* determines its forms.

It is the same in the case where legitimation can result from an act of the authority.

XI

If according to the competent law adoption implies an act of authority, the *lex loci actus* determines its forms. If according to this law adoption can result from a free act, the form of this act is subject to the rule formulated in Article VI.

INSTITUTE OF INTERNATIONAL LAW

Resolution adopted at Lausanne

CONFLICTS OF LAW IN THE MATTER OF CHEQUES

The Institute, considering it advisable to complete the international rules on conflicts of laws as to exchange and bills drawn to order, voted at the Brussels session of 1885,¹ by some rules special to the conflicts as to cheques, adopts the following:

I

The conditions relating to the form of a cheque are determined by the law of the country in which it is issued. The cheque is valid, however, if it meets the conditions required by the law of the country in which it is payable.

II

The law of the country of payment of the cheque determines if title in the sum involved continues to belong to the maker or is transferred as of right to the payee and to successive holders.

III

The law of the country in which the cheque is payable determines

- (a) The persons upon whom the cheque may be drawn.
- (b) Whether the cheque is necessarily at sight or may be for a given time after sight.
- (c) The period within which it is to be presented for payment.
- (d) Whether the maker can object to its payment, and the moment from which this objection may be made, notably, in case of loss or of theft.
- (e) Whether a cheque may be crossed, and what are the consequences of crossing.
- (f) Whether the cheque can be certified, and what are the effects of certification.
- (g) Whether the acceptance of the cheque by the drawee is or is not to be deemed as not written.

VOEU

The Institute, considering that it is not possible to settle the difficulties inherent in the formalities to be fulfilled to obtain a new instrument in case of loss or theft by elaboration of a common rule to adjust conflicts, expresses the wish that this subject be settled by way of a convention for unifying the law.

¹ *L'Institut de droit international*, New York, 1920, page 83.

ADDENDUM

REPORTS ADOPTED BY THE ASSEMBLY OF THE LEAGUE OF NATIONS¹

(a) Progressive Codification of International Law

REPORT OF THE FIRST COMMITTEE TO THE ASSEMBLY

Rapporteur: M. POLITIS (Greece)

The First Committee appointed a Sub-Committee to study the various questions referred to the Committee by the Assembly in connection with the work of the Committee of Experts for the Progressive Codification of International Law.

The Sub-Committee was composed of M. ROLIN (Belgium), Sir Cecil HURST (British Empire), M. POLITIS (Greece), Dr. LIMBURG (Netherlands), Dr. CABALLERO (Paraguay), Count ROSTWOROWSKI (Poland), M. GUERRERO (Salvador) and M. LÖFGREN (Sweden).

The Sub-Committee adopted a report which was approved, with slight modifications, by the First Committee on September 23, 1927.

The First Committee submits this report to the Assembly and recommends the adoption by the Assembly of the resolution proposed therein.

REPORT SUBMITTED TO THE FIRST COMMITTEE ON BEHALF OF THE SUB-COMMITTEE

Rapporteur: M. POLITIS (Greece)

Your Sub-Committee has very carefully examined the documents forwarded by the Council to the Assembly, and it has reached the following conclusions, which it has the honor to submit for your approval.

The Committee of Experts appointed by the Council in pursuance of the Assembly resolution of September 22, 1924, for the progressive codification of international law, having completed the first stage of its discussions, submitted a report to the Council on April 2, 1927. In its annual sessions of 1925-27, it has performed the mission entrusted to it with a zeal, conscientiousness and ability which deserve unqualified praise. The Assembly will no doubt wish to associate itself with the tribute of thanks already paid by the Council to the distinguished Chairman, and the Rapporteurs and members of the Committee.

The Committee recommended to the Council five subjects of international law which, in some of their aspects, are, in its opinion, now ripe for regulation by international action, and stated what it considered to be the most appropriate method for carrying out the preliminary work. It mentioned also

¹ Publications of the League of Nations, V. Legal. 1927. V. 28.

two other subjects of a more particular character for which it suggested a special procedure.

On the report of the Polish representative, M. Zaleski, the Council expressed a number of highly interesting opinions on the Committee's conclusions.

It is for the Assembly to decide what action should be taken in respect of the Committee's proposals and the suggestions which the Council has made regarding them.

I. QUESTIONS WHICH NOW APPEAR RIPE FOR REGULATION BY INTERNATIONAL AGREEMENT

The five questions which now seem to the Committee of Experts to be ripe for codification are the following:

- (1) Nationality;
- (2) Territorial Waters;
- (3) Diplomatic Privileges and Immunities;
- (4) The Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners;
- (5) Piracy.

Of these five questions, the Council took the view that only three should be dealt with at present, the question of diplomatic privileges and immunities and that of piracy being left on one side. Neither of these two questions, on which the conclusion of a universal agreement seems somewhat difficult at the present time, is important enough to warrant its insertion in the agenda of the proposed Conference.

Your Sub-Committee was unanimous in concurring with this view, for it is essential to the success of the work in hand that the agenda of the First Codification Conference should not be unnecessarily overburdened.

The Sub-Committee was further in agreement with the Council's suggestion as to the two particular questions which the Committee proposed should be governed by a special procedure, viz.: (1) the question of the procedure of international conferences and procedure for the conclusion and drafting of treaties; and (2) the question of the exploitation of the products of the sea.

As regards the first question, the Sub-Committee is of opinion that the Assembly should ask the Council to instruct the Secretary-General to have the question investigated by his services. To this end, all available precedents on the subject would be collected, the Governments being asked to give information as to their own practice, which they would no doubt be prepared to do; and research by and discussion with individual specialists in the various countries should be encouraged by giving as much publicity as may prove possible to the results of the enquiry.

As to the second question, the Sub-Committee wholly concurs in the recommendations of the Committee of Experts and of the Council. There is

no doubt that marine fauna is exposed to the risk of early extermination by exploitation which is opposed to economic principles. International protection would fill a real need and at the same time meet the wish of all the Governments concerned. It would be well worth while to establish such protection by means of an international agreement framed by a conference of experts. At the same time, it is quite certain that, at the present stage, there can be no thought of immediately convening such a conference, and we must be content for the present to pave the way for it. For that purpose, it would be well to refer the question to the Economic Committee of the League for investigation, suggesting that it should seek the coöperation of the International Council at Copenhagen and of any other body particularly concerned in the matter. This done, the Economic Committee would report to the Council, indicating how far it was possible to convene a conference. In addition, the Assembly might pass a resolution urging that this investigation should be carried out as expeditiously as possible so that the meeting of the conference need not be too long delayed.

It has been asked whether it would be possible to propose that further questions in addition to those mentioned above might be added to the program of the First Codification Conference. What will be said below regarding the necessity of careful and methodical preparation for the Conference will show how difficult it would be to allow such a possibility. At the Conference no right of initiative can be admitted. It will not even be possible for new questions to be put on the program during the preparatory work. To do so would disorganize the whole scheme. Exercise of such an initiative can only be conceived in the form of submitting to preliminary enquiry new questions the examination of which would be reserved for a subsequent conference.

II. THE FIRST CODIFICATION CONFERENCE

As the number of subjects now ripe for codification is limited to the three questions already stated, your Sub-Committee, following the example of the Committee of Experts and the Council, debated whether these questions ought to be dealt with separately at several conferences, or simultaneously at a single conference, which might be subdivided into different sections. It was of the unanimous opinion that the second alternative was, for more than one reason, the better. Not only did it present the advantage of a great saving of time and money but it would also go further towards satisfying the interest taken by public opinion in the problem of codification.

It should be observed, however, that, if it proved impossible for the Conference to finish its work within the space of time which the Governments participating were able to devote to it, arrangements would have to be made to enable it to hold successive sessions at fixed intervals until it had completed its program.

It remains to consider the date, place and manner of convocation of the Conference.

(a) *Date of the Conference*

The date depends essentially on the preparation necessary for framing the agenda of the Conference, a matter which we shall discuss presently. It is impossible to foresee at all exactly how long this will take. All that can be said is that it is highly desirable that the preparatory work should be performed as rapidly as possible so that the Conference may meet some time in 1929. It is to be hoped that the work will have reached a sufficiently advanced stage for the ninth session of the Assembly to fix the date for which the Conference can be summoned.

(b) *Place of the Conference*

For the place of the Conference, the Sub-Committee, in accordance with the suggestion made in the Committee, proposes The Hague. This choice is good for many reasons.

The Hague, on account of its atmosphere of serenity, so precious to all who have stayed there, is the ideal place for an assembly met to coöperate in a difficult task, the success of which calls in a high degree for calm and reflection; further, the First Codification Conference might rally more States if it met at The Hague than in any other town; The Hague was the seat of the two Peace Conferences to the heritage of which the League of Nations may be said to have succeeded; to convene the First Codification Conference at The Hague would demonstrate the continuity of the effort—an effort today rendered more systematic by the good offices of the League—to invest international law with a little more precision and stability; lastly, the choice of The Hague would be a compliment to the Netherlands Government, which, through its repeated initiatives in connection with the codification of international public and private law, has never failed to render valuable service to the cause of international understanding.

From the statements of the Netherlands representative at the Council, we may venture to hope that, if the Assembly accepts the proposed choice, the Netherlands Government would willingly accede to the Council's request and extend its hospitality to the First Codification Conference.

(c) *The method of Convocation of the Conference*

Your Sub-Committee is unanimously of opinion that the convocation and preparation of the First Codification Conference should be left entirely to the League of Nations. When this point was discussed in the Committee, it was forcibly shown that any other course would be interpreted by a section of public opinion as a real blow to the prestige of the League.

III. PREPARATION OF THE CONFERENCE

Knowledge of the nature of the work to be undertaken, added to the experience gained from certain important conferences in the past, lead to the conviction that, in order to ensure the success of the First Conference on

Codification, it is absolutely essential that the program and organization should be carefully and methodically prepared. This is all the more necessary as the coming Conference is to be the first of a long series of similar Conferences and will establish a tradition which, if it is to be fruitful, must be based on solid and unassailable foundations.

The preparatory work will be specially heavy. It will demand from those who undertake it great sacrifices of time and considerable theoretical and practical knowledge. It must for this reason be entrusted to the Secretariat of the League assisted by a special organization. Your Sub-Committee is of opinion that this organization should be a Committee limited to five persons, possessed of a wide knowledge of international practice, legal precedents and scientific data relating to the problems to be resolved. They should be appointed by the Council.

This special organization must above all make use of the work of the Committee of Experts, taking into account at the same time the resolutions which have already been adopted or are in process of being framed by such learned associations of international law as the Institute of International Law, the International Law Association and other similar bodies. Where necessary, it could apply directly to these bodies and request them to devote the work of their next session to the questions which will be dealt with by the First Conference on Codification. Lastly, in order to ensure the universality of international law, it should take into account the extensive and remarkable effort at codification made during recent years by the Pan-American Union.

After this preliminary work, which would be in the nature of a general survey of the subjects to be dealt with, the Committee would have to undertake an enquiry, approaching the Governments of the States Members and non-Members through the Secretariat, according to the following plan:

It would first of all draw up a schedule for each of the questions coming within the scope of the program of the Conference, indicating the various points which were suitable for being examined with a view to reaching agreement thereon. These points should be detailed as fully as possible so as to make them perfectly clear and facilitate the replies. The States would be invited to furnish information on each point from the following three points of view:

- (a) The state of their positive law, internal and international, with, as far as possible, circumstantial details as to the bibliography and jurisprudence;
- (b) Information derived from their own practice at home and abroad;
- (c) Their wishes as regards possible additions to the rules in force and the manner of making good present deficiencies in international law.

In drawing up the schedules, the Committee should follow as far as possible the precedent offered by the minute and methodical preparation for the London Naval Conference of 1908-09.

The schedules would then be sent through the Secretary-General to the different Governments, with an invitation to reply within a reasonable time, which might be fixed at six months.

If, after examining the replies from the Governments, the Committee considered that it would be useful to make further enquiries of some of them, it would state in a fresh schedule the precise points upon which further particulars were desired. This schedule would again be sent to the Governments concerned through the Secretary-General.

At the end of its enquiry, the Committee would be in a position, after comparing the information sent by the various Governments, to establish the points on which there was agreement or any degree of divergency, in respect of each aspect of the questions to be dealt with. The result of this comparative study of each single aspect should be embodied in a report, the conclusions of which might serve as detailed bases of discussion for the Conference.

In his report to the Assembly in 1928, the Secretary-General should give full information concerning the progress made by the Committee.

When the Committee's work was finished and the bases of discussion for each item on the Conference's program had been fixed, it would remain for the Council to decide the date of meeting and the form of the invitations.

In your Sub-Committee's opinion, the Council, in sending the invitations, should not confine itself merely to enclosing the reports and bases of discussion prepared by the Preparatory Committee. The lessons taught by the experience of the Second Hague Conference and your Sub-Committee's anxiety to ensure the complete success of the First Codification Conference lead it to think that the Council should also send the Governments invited to the Conference a draft set of regulations for the work, and that it would be highly desirable that, in this document, a number of general rules should be indicated with precision in order to make clear the spirit in which the work of the Conference would be conducted and also the scope of the decisions it would be called upon to take.

Your Sub-Committee considers that these rules should include the four following:

(a) *Rule of Unanimous Vote or Majority*

Although it is desirable that the Conference's decisions should be unanimous, and every effort should be made to attain this result, it must be clearly understood that, where unanimity is impossible, the majority of the participating States, if disposed to accept as among themselves a rule to which some other States are not prepared to consent, cannot be prevented from doing so by the mere opposition of the minority.

(b) *Rule of the Scope of the Engagements entered into*

In such matters as may lend themselves to this, it would be useful to provide for the possibility of concluding two kinds of convention: a very comprehensive convention on the general rules of the subject, likely to be ac-

cepted by all States; and a more restricted convention, which, while keeping within the framework of the other convention, would include special rules binding only upon such States as might be prepared to accept them.

(c) *Rule of the Flexibility of the Conventions*

As these agreements are meant to define and fix the law, it is not to be supposed that they could be concluded for limited periods or with the option of denunciation. They must be permanent. But, with the double object of facilitating their acceptance by all States and of making it possible to adapt the rules laid down to the changing needs of life, it would be desirable to provide an organized system of revision, such as follows:

Any convention drawn up by the Conference would be subject to revision after the expiration of an initial period of ten years if a request to that effect was received from a certain number of signatory States. In that case, it would be for the Council of the League to summon a conference at the earliest possible opportunity to consider what amendments were to be made in the convention the revision of which had been demanded.

(d) *Rule of the Spirit of the Codification*

Codification of international law can be imagined in several forms. It might be a mere registration of the law in force. It might be something more if, instead of merely recording the rules already in existence, an attempt were made to adapt them to practical needs. Lastly, it might be an entirely original work designed to make good the present deficiencies in the law or to replace the old rules by new. Although it is very difficult to lay down strictly beforehand in what spirit the work of the First Codification Conference should be conducted, it can be stated that while, in order to lead to useful results, the Conference must refrain from making too many innovations, it cannot limit itself to the mere registration of the existing law. It must, as far as possible, adapt the rules to contemporary conditions of international life. It is in order to avoid any misunderstanding on this matter that the States which are to take part in the Conference should be apprised of the spirit in which the work of codification is to be undertaken.

IV. FUTURE OF CODIFICATION

It was proposed to the Committee that a permanent organization for codification should be formed, by constituting a permanent legal committee and perhaps enlarging the Legal Section of the Secretariat. Your Sub-Committee is unanimous in thinking that these plans are, to say the least, somewhat premature. The experience of the Preparatory Committee and the proposals which it may formulate next year should first be awaited.

As regards the continuation of the work of the Committee of Experts, your Sub-Committee endorses the opinion expressed in M. Zaleski's report, which represents the views of the Committee itself. The Committee should hold the session which it contemplates for the purpose of completing the work it

has already taken in hand, so soon as funds are available; but it would be premature to ask it at present to carry its enquiries further. It would be better to await the results of the work which it has already accomplished.

V. CONCLUSION

As conclusion to the above observations, your Sub-Committee proposes that you should adopt and submit to the Assembly the following draft resolution:

(See resolution adopted by the Assembly September 27, 1927, printed *supra*, page 231.)

(b) Proposal by the Delegation of Paraguay for the Preparation of a General and Comprehensive Plan of Codification of International Law

REPORT SUBMITTED BY THE FIRST COMMITTEE TO THE ASSEMBLY

Rapporteur: Dr. CABALLERO (Paraguay)

The First Committee referred the proposal of the delegation of Paraguay to the Sub-Committee which it had appointed to report on the various questions arising out of the work of the Committee of Experts for the Progressive Codification of International Law. The Sub-Committee consisted of M. ROLIN (Belgium), Sir Cecil HURST (British Empire), M. POLITIS (Greece), Dr. LIMBURG (Netherlands), Dr. CABALLERO (Paraguay), Count ROSTWOROWSKI (Poland), M. GUERRERO (Salvador) and M. LÖFGREN (Sweden).

The Sub-Committee adopted a report which was approved with slight modifications by the First Committee on September 23, 1927. The First Committee submits this report to the Assembly and recommends the latter to adopt the resolution contained therein.

REPORT OF THE SUB-COMMITTEE

Rapporteur: Dr. CABALLERO (Paraguay)

The First Committee has asked the Sub-Committee to present a report on the proposal submitted by the delegation of Paraguay at the plenary meeting of the Assembly on September 10, 1927, inviting the Council to entrust the Committee of Experts with the preparation of a general and comprehensive plan of codification of international law, paying due regard, as far as possible, to the work of codification which is being carried on in America.

It is unnecessary to mention the considerations which led the delegation of Paraguay to submit this proposal, as they were explained in detail both in the Assembly and at the meeting of the First Committee on September 16, 1927.

The proposal was referred to the Sub-Committee of the First Committee, for consideration in the light of the results already obtained by the Committee

of Experts for the Progressive Codification of International Law, and bearing in mind the views and opinions expressed by the First Committee.

The Sub-Committee considers that the proposal of the delegation of Paraguay is of the highest interest for the attainment of unity and universality in international law.

It is of opinion that it would be advisable to consider the possibility of framing a general draft plan of codification, with special reference to nomenclature, and the systematic classification of subjects, with a view to their progressive codification as and when they are considered sufficiently ripe.

In carrying out this task, regard should be had, as far as possible, both from the scientific and practical standpoints, to the advance of theory, to the work already accomplished by learned bodies and to the vast and remarkable efforts at codification which are being carried on in America.

The task might be entrusted to a special Committee chosen by the Council; the members of this Committee should not merely possess individually the required qualifications, but should also represent the main forms of civilization and the principal legal systems of the world. The Sub-Committee, however, considered that it would be premature to appoint any special organ for the purpose at the present time. It is preferable to wait until the Assembly is in a position to draw up the future program of work for the Committee of Experts. It would be sufficient for the moment to invite the Committee of Experts to consider at its next session the conditions under which the problem might be investigated and to present a report to the Council, which would communicate these suggestions to the Assembly.

The Sub-Committee has accordingly the honor to propose that the following draft resolution be submitted to the Assembly for its approval:

(See resolution adopted by the Assembly September 27, 1927, printed *supra*, page 232.)